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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

NOS. 84 AND 85.

ALABAMA POWER COMPANY, *Petitioner*,

v.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents*,

ALABAMA POWER COMPANY, *Petitioner*,

v.

HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, et al., *Respondents*,

---

BRIEF FOR PETITIONER.

PERRY W. TURNER,
NEWTON D. BAKER,
WILLIAM H. THOMPSON,
R. T. JACKSON,
DEAN ACHESON,
Attorneys for Petitioner.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. Vol. I, 437) has been reported in Vol. LXIV, WASH. L. REP. 563. That of the Court of Appeals (*Id.* 509) has been reported in 91 F. (2d) 303.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. The decrees of the Court of Appeals were entered May 10, 1937. (R. Vol. I, 516-517.) Writs of certiorari were granted June 1, 1937. (*Id.* 522.)

STATUTES INVOLVED.

The statutes involved are Title II of the National Industrial Recovery Act, (48 STAT. 200) printed *infra*, p. 71, and the Emergency Relief Appropriation Act of 1935 (49 STAT. 115), printed *infra*, p. 79.

STATEMENT OF THE CASE.

As originally brought, these were five suits in the United States District Court for the District of Columbia seeking to enjoin the making of loans and grants by the respondents to ten municipalities for the construction of electric-power distribution systems as federal public works projects. The plaintiffs were the Texas Utilities Company, the Alabama Power Company (in two cases), the Oklahoma Utilities Company, and the Iowa City Light and Power Company. The defendants were the Federal Emergency Administrator of Public Works and certain of his subordinates, together with the Secretary of the Treasury, the Treasurer of the United States, and the Chief Disbursing Officer of the United States. (Fdgs. 1-12, R. Vol. I, 447-450). These cases were chosen for trial by agreement of counsel as representative of fifty-seven similar cases pending in the United States District Court for the District of Columbia.

Several of the cases have become moot by virtue of withdrawal by some of the cities of their applications for loans and grants. This is true of the suits by the Texas Utilities Company, the Oklahoma Utilities Company, the Iowa City Light & Power Company, and of the suit of the Alabama Power Company (No. 84) insofar as it related to the proposed loans and grants to the cities of Florence and Tuscumbia, Alabama. Likewise the suit of the Alabama Power Company (No. 84) insofar as it related to the proposed loan and grant to Sheffield has become moot, since the town has recently completed an electric distribution system, is furnishing the inhabitants with electricity, and the petitioner has been required to remove and has removed its facilities from the town.

Petitioner, Alabama Power Company, generates and distributes electricity wholly within the State of Alabama. (R. Vol. II, 23-25.) It operates distribution systems throughout the State and, of particular concern here, in four towns in northwestern Alabama—Decatur, Hartselle, Guntersville, and Russellville. The petitioner has non-ex-

clusive unexpired franchises (R. Vol. II, 16-20), and is the only agency distributing or presently equipped to distribute electricity in these towns. (R. Vol. I, 448, R. Vol. II, 20.) Petitioner's properties in the towns have a value of approximately $570,000. (R. Vol. II, 90.) Its rates are regulated by the Alabama Public Service Commission. (R. Vol. II, 20.)

The respondent officials of the Federal Emergency Administration of Public Works (PWA) have entered into a contract with each of the Alabama towns, providing for the construction in it, as a "Federal Public Works Project", of a municipal electric distribution system. These towns will obtain their electricity from the Tennessee Valley Authority. The terms and conditions under which they will obtain it are disclosed by the contract already entered into between Sheffield and the Tennessee Valley Authority. ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1936, p. 223, (Government Printing Office); see *infra*, p. 56. The systems are to be built entirely with federal funds, of which part is to be an outright gift or grant, the remainder being repayable only out of the earnings of the system. (R. Vol. I, 259-278, 378-436.) The amounts of the loans and grants and the authority under which the Administrator purports to act are given below:

Town	Loan	Grant	Statute
Decatur	$250,000	$100,000	Title II, N. I. R. A.
Hartselle	33,000	27,000	Emergency Relief Appropriation Act, 1935
Guntersville[1]	48,000	39,272	Emergency Relief Appropriation Act, 1935
Russellville	69,000	56,454	Emergency Relief Appropriation Act, 1935

[1]Under the loan and grant agreements between PWA and the towns, the latter may if they choose raise the money to be borrowed by selling their obligations to parties other than PWA and PWA agrees to take up any unsold balance within the limits

The contracts between PWA and the towns not only provide that the projects shall be known as federal public works projects but cover every detail of the construction work, just as though the work were being done for the United States Government. The plans and specifications must be approved by the Administrator. The method of letting the construction contracts is prescribed; performance bonds and liability insurance are required; the construction contracts must provide for a 30-hour week, minimum wages, employment preferences, collective bargaining, use of human labor in lieu of machinery when possible; the provisions of the "Kick-back" Statute must be incorporated; reports must be made to numerous government bureaus, etc., etc. (See, e. g. R. Vol. I, 259-278.)

If the contemplated projects are carried out, the business of the petitioner in the four towns will be wholly destroyed. The elimination of the petitioner is essential to the financing of the projects. The towns, in their applications to PWA, said:

> "The distribution system is intended to practically duplicate and supplant a public utility distribution system.
>
> • • • • • • • • • •

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and under the conditions specified in the agreement, and to make the grant. The grant may be used to pay for construction or to pay bond interest and maturities. Guntersville, since the decision of the Court of Appeals, has entered into an arrangement with an electrical construction firm, whereby in substance the firm will take bonds in payment for constructing the system. This arrangement is involved in litigation in the state courts and may never be carried out. The Town is still asking for the loan and grant from PWA. The Mayor stated in an affidavit, sworn to September 1, 1937, and filed in the state court: "We had at all times kept our application with the PWA for both the Loan and Grant and it is still pending . . ." In the ordinance of July 1, 1937, which authorized the bonds under the new contract, the purpose of the issue is stated to be, "to defray the cost of the above-described improvement, exclusive of that part of the cost thereof which may be met by any grant or grants of money by the United States of America . . ."

> "The project will not be competitive since practically all of the consumers are signed up for a ten (10) year period." (See, e. g. R. Vol. II, 109, 111, 126-127.)

PWA reached the same conclusion and, in computing the financial soundness of the projects, assumed that the petitioner would be immediately eliminated. (See, e. g. R. Vol. II, 347-349.)

Construction of the distribution systems will be directly caused by the Administrator. The stated purpose of the Public Works program was to cause construction which would not otherwise take place. PWA officially declared that "the public grants are given to induce public bodies to undertake construction of useful works . . ." (R. Vol. II, 401.) To this end the offer of grants and revenue loans was given wide publicity. (R. Vol. II, 420, 535-6.) And the financial condition of the towns was such that they could not have undertaken to duplicate the petitioner's facilities by new construction unless the Administrator had offered to give them free and clear, in one case, 30 per cent of the cost and, in the other three cases, 45 per centum. Officials of the towns freely stated either that their obligations were in default or that they could not sell municipal obligations to provide funds for new construction or purchase of the petitioner's systems. (R. Vol. II, 70, 78, 98, 108, 123, 129, 159, compare *Ashton* v. *Cameron County*, 298 U. S. 513, 533.) The applications of the towns to PWA point out that the requests for the projects were predicated upon the free grant of from 30 per cent to 40 per cent of the cost, and that the earnings were expected to repay the loan of the remaining amount. (R. Vol. II, 96-97, 101, 114.) Two of the towns, no longer involved, set such store by the proffered gifts that, in negotiating to purchase petitioner's systems within their limits, they insisted that the purchase price be reduced by the amount of the gift obtainable if a new system were built. (R. Vol. II, 45, 50, 56, 57.)

Legal Authority of the Administrator. The authority of the Administrator must be found, if at all, in the statutes printed in the Appendix, *infra*, p. 71, and discussed *infra*, pp. 34 to 47, and in the administrative procedure had thereunder.

The action taken by the President with regard to these projects is contained in documents described on pages 338-361 of Volume II of the Record. It may be summarized as follows:

Lists, called "books", of "Non-Federal Projects Which Are Deemed Desirable", were presented by the Administrator to the President. These contained an index giving the location, type of project, and amount of loan and grant of each project. These amounts were totaled at the end of the index. Following the index was a brief description of the construction proposed in each project. At the end of the index appeared in pencil the letters, "O. K. F.D.R."

Attached to the list including the Hartselle, Guntersville, and Russellville projects was a letter from the President to the Secretary of the Interior (R. Vol. II, 355), which contained the following:

> "Pursuant to the Emergency Relief Appropriation Act of 1935, I hereby:
>
> . . . . . .
>
> "III. Approve the projects included in the program of public works set forth in the annexed 'Schedule B', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project."

It is agreed on the Record (R. Vol. II, 338-339) that the documents mentioned above represent all the orders and findings of the President, Administrator, or any officials having authority to make ultimate determinations in regard to these projects.

The applications of the towns were made to field officers of PWA. They were forwarded with reports to Washington where they were further examined by an Engineering Division, a Finance Division, a Legal Division, and, for a time, by an Electric Power Board of Review, later by a Projects Division. From time to time a list was made of those projects which were approved by the Divisions mentioned. This list was then submitted to the Administrator and for a time to an advisory body known as the Special Board for Public Works. The list was then presented to the President for his approval as stated above. (R. Vol. II, 314-316.)

The petitioner subpoenaed the reports or recommendations of the examining divisions in order to establish that criteria for approval of projects not authorized by the statutes were employed, but, with the exception of one report voluntarily produced (R. Vol. II, 346), the trial judge ruled that they were immaterial and need not be produced. (R. Vol. II, 350-351.)

However, the evidence in the record establishes that the standard or criterion applied in approving these projects was not the relief of unemployment—in fact, there is no evidence that there was any contemporaneous investigation or finding as to any effect of these projects upon unemployment—but was the furnishing of a market for TVA power and the establishment of yardsticks to measure and reduce rates for electric energy produced and sold wholly within a state, as set forth below.

The list submitted by the Administrator to and approved by the President containing the Decatur project, the largest of the four, recited that the project was recommended "for the reason, among others, that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its

electrical energy . . .'' (R. Vol. II, 343-4.) The original contracts between the Administrator and the towns (since cancelled) conditioned the loans and grants upon the towns' making contracts with TVA to take its power and to charge rates prescribed by it. (See *infra*, p. 58, footnote; R. Vol. I, 126.) The contracts between municipalities and TVA, *infra*, p. 59, prescribe the resale rates to be charged and provide that they may be changed only with the consent of TVA. Although all the applications for loans and grants were made by the towns between August 30, 1933 and December 20, 1933 (Vol. I, 455-457, R. Vol. II, 156), no contracts with the towns were made by PWA until December 6, 1934, and no steps to advance funds were taken until just prior to the institution of these suits in July, 1935. This delay was occasioned, and it was so stated by the Administrator, by negotiations undertaken by TVA to acquire the Company's distribution systems in the towns. (R. Vol. II, 136-139, 142-146, 476.)

The Electric Power Board of Review (a division in the Public Works Administration) which reviewed and approved these projects considered principally "social desirability", in accordance with rules prescribed by the President. (R. Vol. II, 373.) Its members—

> "did not place a great deal of importance on employment as bearing on social desirability. Primarily, the employment was more or less limited on municipal (electric) projects as compared with a great many of the others, and the class of employment was too technical to become selected from the local unemployment situation. The people who had to be employed on a municipal electric project were such skilled labor that they could not be found in most communities. The number of people employed on those projects as a type was considerably less than on other projects. The board found the principal element of social desirability in municipal electric projects in the difference in the cost of service to the consumers. If the cost of service to the consumers was lower from the project than they were obtaining

under the existing conditions, it was considered very desirable from a social standpoint. That means, if the rates suggested in the application were lower than the existing rates." (R. Vol. II, 252.)

In his testimony in this case the Administrator said much the same thing: (R. Vol. II, 516)

"Dealing specifically with an application for a duplicating and competing municipal power project, there might be several elements of social desirability which governed the action and decision of PWA. You might put the municipality in the position of being able to supply current to its citizens at a lower rate. It certainly gave employment in constructing and in operating the plant, and it might have the effect of removing from the municipality the heavy, and in some cases the corrupting, hand of a public utility. All those were criteria which were proper to be considered by PWA in determining the social desirability of an application for a loan and grant for competing municipal projects. I think, in a general way, they were considered."

On September 27, 1934, PWA made an announcement to the press as follows: (R. Vol. II, 253-5)

"Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

"Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

"The statement of Administrator Ickes followed action by some privately owned utilities, which, on reexamination of their condition, found it possible to reduce rates to a point below those proposed by municipal project plants.

"In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

"In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

"Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cogniznant of the greater use of power resulting from lower rates.

"Administrator Ickes said:

"'PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"'However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate

facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

" 'Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

" 'PWA will co-operate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

" 'State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect.' "

The Administrator repeatedly announced the same criterion for granting or refusing applications for municipal electric systems at his press conferences. In the words of the United Press correspondent,

"He said that the reasonableness of private utility rates would be one of the determining factors in consideration of loan and grant applications. By that, I mean the reasonableness of the private utility rate in the town which applied for the loan and grant. Mr. Ickes made this statement more than once. I could not estimate how many times, although it has run re-

peatedly through his discussion of municipal power plants, and his program." (R. Vol. II, 362.)[1]

[1]Similar statements were made in documents offered in evidence by the plaintiffs and excluded as irrelevant by the trial judge, the exclusion being assigned as error. In an article in *Today*, of November 17, 1934, Mr. Ickes said: (R. Vol. II, 395) "This is not the place for a detailed discussion of the power policy of Public Works. But that policy also conforms to the general purpose to strengthen private enterprise . . . Loans for municipal power plants have been granted only upon application of the municipality concerned and upon a clear showing that the existing rates can be substantially reduced after adequate provision for interest and amortization. Private (power) companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA."

On November 8, 1933, the Deputy Administrator of PWA, H. M. Waite, sent circular instructions to PWA State Engineers containing the following: (R. Vol. II, 393) "A number of inquiries have come into me regarding our attitude and procedure in regard to applications for loans for municipal light plants. . . We are most anxious to set up around the country sound publicly owned utilities as yard-sticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates for electricity."

In the same month TVA, which is seeking an outlet for its power in the Alabama towns, through its Director and General Counsel, David E. Lilienthal, stated its purpose thus: (R. Vol. II, 417)

> "Now that is what had been going on throughout the United States. Regulation by commissions had in many states proved ineffectual. In some states it was perfectly obvious that the regulators were not regulating the utilities, but in effect, the utilities were regulating the regulators. In other states, the regulatory commissions were doing an honest and sincere job, but were hampered by the interminable procedure of regulation, with rate cases sometimes dragging through a decade. And so, to supplement regulation by commissions, Congress passed the Tennessee Valley Authorities Act. This Act is not an assault upon private ownership and management of public utilities. But it is a determined attack on private mis-management of the public business of power at the expense of the people back home—consumers and investors alike. • • •
>
> "It was with such a background that Congress passed the Tennessee Valley Authority Act, and set up a measure of public operation of the power business. This public opera-

Proceedings below. Petitioner filed these bills in the United States District Court for the District of Columbia to enjoin the respondents from making the allotments under the contracts between PWA and the towns, or from paying to these towns any funds whatsoever for the construction of electric systems. After trial the trial judge dismissed each of the bills upon the merits, holding that the petitioner had a standing to present and have adjudicated the question of the legal authority for the threatened acts of the respondents, but that their acts were authorized by the statutes and that the statutes so construed were constitutional. (R. Vol. I, 472.) The Court of Appeals affirmed the decree of the trial court, without inquiring into the legal authority for the threatened acts, on the ground that the petitioner had no standing to question their validity.

The Court of Appeals held that the petitioner was without standing to question the legal authority for the Administrator's acts, because, it said, the thing which will affect the petitioner is the competition of the municipal plants and that is lawful. The opinion of the Court is apparently based upon the legal proposition that no one, no matter how seriously injured, can question the legal authority of a public official whose acts cause the injury, provided its impact upon the plaintiff comes from the intervening legal act of a third party. Such damage, the Court says, is *damnum absque injuria*, not merely as against the person acting lawfully, but also as against the official acting, according to the plaintiff, unlawfully. Therefore, the legality of the official's conduct cannot be examined.

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tion is to serve as a yardstick by which to measure the fairness of electric rates. It has an additional function. It is a reminder that electricity performs a public service. It is a reminder that unless that business is conducted by private corporation with fairness, without financial jugglery and with a due sense of responsibility to the paramount public interest, that the public at any time may itself assume the function of providing itself with this necessity of community life."

SPECIFICATION OF ERRORS.

1. Whether the Court of Appeals erred in holding that a public utility cannot question the legality of the action of federal officials who are about to inflict irreparable injury upon its business, by promoting and financing, as federal public works projects, municipal plants which are intended to and which will duplicate and supplant its facilities and business.

2. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49 STAT. 115), and Title II of the National Industrial Recovery Act (48 STAT. 200) do not authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as federal public works projects, in the circumstances disclosed in this record.

3. Whether the Court of Appeals erred in failing to hold that the Emergency Relief Appropriation Act of 1935 (49 STAT. 115), and Title II of the National Industrial Recovery Act (48 STAT. 200), if construed to authorize gifts and loans of federal moneys to municipalities for the construction of local electric distribution systems as federal public works projects, in the circumstances disclosed in this record, are unconstitutional, because:

(a) They delegate legislative power to the executive.

(b) The gifts and loans are not authorized by the General Welfare Clause of the Constitution or by any other clause thereof.

(c) The gifts and loans will have the necessary effect of extending federal control over and regulating matters reserved to the states or the people by the Tenth Amendment.

(d) The gifts and loans will have the direct and necessary effect of destroying the balance established by the Constitution between the Federal Government and the states.

SUMMARY OF ARGUMENT.

I.

The petitioner has a standing to question the legality of the respondents' acts. Petitioner, will sustain a direct and special injury caused by these acts, and will not suffer in an indefinite way in common with people generally. Its interest, in fact, is vital, since its business in the four towns will be destroyed, and its property there rendered worthless. Petitioner's right is to conduct its business free from interference and injury from public officials acting without authority in law. Respondents' duty is to refrain from injurious acts unless authorized by law. Respondents' acts are the proximate cause of petitioner's injury. They propose to authorize and finance, as federal public works projects, electric distribution systems which are designed and intended to and will supplant petitioner's facilities and take all of petitioner's customers in the four towns. Respondents are to be repaid—and can only be repaid—from the business which is now petitioner's. Petitioner's irreparable injury is contemplated, caused, and required by respondents' acts.

It is immaterial whether private persons would incur liability by doing the acts threatened by respondents. The basis of suit against these public officers is the absence of lawful power and the abuse of authority in doing the acts which cause irreparable loss to the petitioner in violation of its right to enjoy its property and conduct its business subject only to such interference from public officials as the law warrants.

It is immaterial also that the impact of the injury upon petitioner will be produced by the operation of the plants by the towns. This operation is contemplated and required by the respondents' acts, which remain the proximate cause of the injury. Injury resulting from the competition of a third person is legal injury, giving the petitioner one of the required foundations to judicial determination of its

claim that the acts causing the legal injury constitute legal wrong.

II.

Title II of the National Industrial Recovery Act, *infra* p. 71, and the Emergency Relief Appropriation Act of 1935, *infra* p. 79, are unconstitutional delegations of legislative power. Title I of the NIRA was declared unconstitutional on this ground in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. Title II and the Act of 1935 are even more sweeping in the power conferred. The President is given discretionary power to spend billions of dollars with no more definite guide to the end sought or the means to attain it than that he should engage in or finance "public works projects". The Administrator has stated freely the total absence of anything which could be used as a guide for PWA. History shows that the term "public works project" did not furnish an objective or a path by which to attain one. Experience under the statutes shows that the term failed to furnish either guide or standard. The term "public works project" acquired a meaning as broad as the word "anything". Whatever principles or standards were established were provided not by the Congress but by the President.

The Constitution confers the power to spend for the general welfare upon the Congress, not upon the Executive. It was not by chance that this was done. The framers were placing the seal of culmination on the centuries-old struggle of English-speaking people for the power of the people through their legislature to specify the objects of expenditure. Courts of the states have been fully aware of this struggle and have held that the legislative branch cannot delegate this power to the executive. No such plenitude of power as these statutes attempt to give to the President over the expenditure of eight billion dollars is susceptible of transfer from Congress to the Executive.

Congress has not ratified the acts of the Administrator here challenged. Since Congress had no power to authorize the acts of the Administrator, it is obvious it could have no power to ratify them. Respondents contend that the Emergency Relief Appropriation Act of 1936 (49 STAT. 1608) may be construed as a ratification of these projects. The Act admittedly contains no express ratification of previous administrative acts, as did the Gold Reserve Act of 1934, Sec. 13 (48 STAT. 337, 343); and the Act of August 24, 1935, c. 641, Sec. 21(b) (49 STAT. 750, 771). Nor is there in its language any approval or ratification within principles hitherto enunciated by this Court. Nor did the Committee which reported the act, as shown by the Chairman's statement intend to do more than to permit grants or gifts to be made from the PWA revolving fund, which had previously been available only for loans, the gifts to be made for the same types of projects for which the loans had been made. No attempted ratification of any prior acts can be tortured from this statute.

III.

The loans and grants are unauthorized because the Administrator in approving them has applied a standard or criterion which Congress has not and could not validly provide. Respondents attempt to find a standard in the purpose stated in the statutes to provide employment. But they at once destroy the so-called standard as a guide to administration by insisting, as the facts require them to, that any project meets the standard because any project involves some labor. On the other hand, the record leaves no doubt that the Administrator in determining whether or not to make these loans and grants applied the sole test of whether doing so was or was not necessary to provide retail outlets for power generated by the Tennessee Valley Authority which would be distributed under the rate control of that Authority. In other words, the criterion was whether or not the construction of these projects would provide a

means for lowering intrastate electric rates in Northern Alabama by TVA competition. Although courts will not review the discretion of an administrative official exercised within its legal scope, they will grant relief if he applies rules or principles which are not authorized by law. The Administrator has done so in this case.

IV.

If the statutes be construed to authorize what has been done here, they are unauthorized by any power delegated to the Federal Government and violate the Tenth Amendment. The control of intrastate electric rates, either directly through regulation or indirectly through competition, is a state function. Whenever federal power is exerted within what would otherwise be the domain of state power, its justification must clearly appear. The modicum of employment which might be created by these projects is a remote, speculative, and collateral consequence of them and is not the clear justification of the exercise of the federal power which alone will sustain it. It would be plain, if Congress expressly authorized the criteria and standards applied here by the Administrator, that they were not reasonably and naturally adapted to the effective exercise of the general welfare power. This power must be exercised for a national and not a local purpose and cannot lawfully be made the means of controlling matters of local concern.

ARGUMENT.

I.

THE PETITIONER HAS SHOWN FACTS WHICH ENTITLE IT TO QUESTION THE LEGALITY OF THE RESPONDENTS' ACTS.

The petitioner has a standing to question the legality of the respondents' acts if the facts established by the record entitle it to equitable relief on the assumption that the

respondents are without legal authority to do the threatened acts, either because they are beyond the authority conferred by the statute or because the statute, if construed to authorize them, is beyond the power of Congress. The petitioner is entitled to such relief if the respondents owe a duty to the petitioner to refrain from the unauthorized acts, if the commission of them will be the proximate cause of irreparable loss and damage to the petitioner, and if these consequences to the petitioner are of the kind recognized as legal injury.

The respondents have argued in the lower courts that the test of whether they owe a duty to the petitioner to refrain from the acts threatened—admitting for the purpose of this argument that they are unauthorized—is whether private individuals would incur liability from committing them. They argue that the respondents stripped of legal authority are merely private individuals and that the rights and duties of the parties must be determined by principles applicable in suits between one private individual and another.

The argument is as unsound in principle as it is opposed to authority. In many cases the act of the officer, if unauthorized, would fit into such common forms of action as trespass, but in a great and growing field of activity an officer acting under color of authority is not acting as a private person, the consequences of his acts are not the same as those of a private person, and no private person could conceivably propose to act in the same way. In short, the argument is wholly verbal and unrealistic. But the error in principle goes deeper.

The argument assumes that the legal principles determinative of the standing of the plaintiff to question the legality of acts of a public officer should be those which have been evolved to determine rights to *recover* against a *private* person. Nothing could be more fallacious. The principles determining the right to recover against private persons are the result of long and careful evaluation of the conflicting interests of private persons. A rule of law which makes

the difference between victory for the plaintiff and victory for the defendant represents the accumulated wisdom of courts and legislatures as to how private persons should live together and how loss, as between them, should be borne. These issues involve basic considerations of policy, but to make that same policy determinative of the right to question the statutory authority of a public officer disregards vital differences.

The considerations which should be, and have been, determinative with courts in formulating the principles affecting the right of private persons to question the authority of public officers are the necessity of affording protection against injury resulting from abuse of authority, while avoiding officious and burdensome litigation, and the assertion of fanciful wrongs and insubstantial injuries. Recognizing, as they should and must, this vital difference in the function and purpose of the rules involved in determining when a plaintiff may question the authority of a public officer and when he may recover from another private individual, courts have not, as respondents argue, blindly confused the two; but in determining the former have referred to the latter merely as a guide, by analogy, to types of injuries to plaintiffs of which the law will take note. A reference to the authorities will avoid further abstract discussion.

Ex parte Young, 209 U. S. 123, turned upon the validity of an injunction obtained by stockholders of a railroad in a federal court forbidding the Attorney General of Minnesota from bringing suit to enforce the provisions of a state law claimed to be unconstitutional. Among the questions decided by this Court were the two: whether the commencement of a suit to enforce an unconstitutional statute was an actionable injury; and what rights or duties formed the basis of the suit. On the first of these questions this Court held that the injury to the plaintiff from the bringing of the unauthorized suit was comparable to injuries which the law redressed, and that such injuries were not confined to those

produced by the more familiar wrongs. Referring to *In re Ayres*, 123 U. S. 443, the Court said:

> "It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property." (p. 153)

Turning to the effect of the threatened action upon the plaintiff the Court continued:

> "Whether the commencement of a suit could ever be regarded as an actionable injury to another, *equivalent* in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. (p. 153)
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> "In those cases the only wrong or injury or trespass involved *was the threatened commencement of suits* to enforce the statute as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be *equivalent to any other threatened wrong or injury* to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer." (p. 158) (Italics supplied.)

Thus the point is driven home that it is the substantial nature of the consequences to the plaintiff with which the Court is concerned. If these are equivalent to injuries which courts are accustomed to recognize and redress, they constitute legal injury in the suit against the officer.

But it was pointed out by Mr. Justice Harlan in his dissenting opinion, as is urged by respondents here, that, viewed simply as a private person, the Attorney General had violated no duty owed to or right of the plaintiffs. "He could not become personally liable to the railway company *simply because of his bringing the mandamus suit.* . . . The mere bringing of such a suit could not be alleged

against him as an individual in violation of any legal right of the railway company or its shareholders. . . ." (p. 197)

This argument—as stated above, unrealistic in fact and unsound in principle—this Court rejected. The principle it adopted has been stated by the present Chief Justice with incomparable terseness:

> "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte Young*, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property." (*Philadelphia Co. v. Stimson*, 223 U. S. 605, 621.)

In the *Stimson* case, *supra*, the Secretary of War, if he had been a private citizen would have incurred no liability by threatening suits to enforce a harbor line which he had drawn. Similarly private persons would have owed no duty to the plaintiff which would have been violated by the acts threatened by the public officers in *Pierce* v. *Society of Sisters*, 268 U. S. 510 or *Terrace* v. *Thompson*, 263 U. S. 197, or *Hammer* v. *Dagenhart*, 247 U. S. 251, or *Truax* v. *Raich*, 239 U. S. 33. In *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492, if the Secretary of the Interior had been a private individual, and asserted a claim unauthorized in amount for surveying public land before issuing a patent—if the situation can be imagined—no legal duty to plaintiff would have been violated. Similarly in *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, the plaintiff sued to enjoin a state official from declaring that it was without authority to do business in the state—an act which

no private individual could perform, and which if threatened would not involve liability.

In all these cases the principle entitling the plaintiffs to question the officials' authority is the same—the plaintiffs had a right to hold their property or conduct their business free from injury by public officials from acts done without lawful power and in abuse of authority. Public officials owe a duty to refrain from interfering with the property or business of the plaintiffs and from injuring them therein without authority or in abuse of it. When an act, in violation of this duty, will be the proximate cause of consequences to the plaintiff so substantial and onerous as to be comparable to injuries which the law is accustomed to note as legal damage, a cause of action is asserted and the right to an injunction established.

The rule is no different when the injury flows from an unauthorized use of the spending power. There the plaintiff also establishes his right to question the authority of the officer if he is—

> "able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (*Frothingham* v. *Mellon*, 262 U. S. 447, 488.)

This petitioner has shown just such immediate threat of direct and special injury. In the present cases the Administrator has authorized for purposes which he claims are authorized by law, the construction, as federal public works projects, under his supervision and with funds provided by him, of facilities which are intended to supplant the petitioner's, and which must do so if the loans contemplated are to be repaid. It is this action of his, in causing the construction for alleged federal purposes and with federal funds, which threatens the petitioner's business with destruction. The elimination of the petitioner from the towns

is essential to the financing of the projects. (R. Vol. II, 122.) The towns have already provided for this elimination. In the words of their own officials, they intend to supplant the petitioner's distribution systems.

> "The project will not be competitive since practically all of the consumers are signed up for a ten year period." (*Supra* p. 5.)

It is equally plain that construction of each supplanting system is to be undertaken as a federal public works project, subsidized by the Administrator. We have already pointed out that the purpose of the public works program was to cause construction which would not otherwise take place, and referred to the official declaration of PWA that the public grants "are given to induce public bodies to undertake construction of useful works". (*Supra* p. 5.)

The fact that the impact of the injury upon the petitioner will be produced by action of the towns does not render the Administrator immune from petitioner's suit. The fact remains that he is the proximate and moving cause of the injury which it will suffer solely because of his unlawful acts in authorizing and financing these particular federal public works projects with gifts and revenue loans, the repayment of which contemplates and requires the destruction of petitioner's business in the towns. It is well settled that where one without warrant or justification in law, induces and enables another to inflict injury on a third party, the wrongdoer is liable even though the intervening party may act within his legal rights. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 251-252; *Walker* v. *Cronin,* 107 Mass. 555; *Thacker Coal Co.* v. *Burke,* 59 W. Va. 253; *Deon* v. *Kirby Lumber Co.,* 162 La. 671; *U. S. Fidelity & Guaranty Co.* v. *Millonas,* 206 Ala. 147; *Gibson* v. *Fidelity and Casualty Co.,* 232 Ill. 49; *Rice* v. *Manley,* 66 N. Y. 82; *Benton* v. *Pratt,* 2 Wend. 386; compare *Angle* v. *Chicago, St. Paul, M. & O., Ry. Co.,* 151 U. S. 1, 12-13, 22, 23. As the trial court concluded, ". . . the furnishing of the

funds by the Government and the resulting competition are so closely connected that, if the statute under which the funds are supplied is unconstitutional, or if the officer furnishing the funds is not authorized to do so, then the plaintiffs may test those questions on the merits." (R. Vol. I, p. 439.) And Judge Soper said in his dissenting opinion in *Greenwood County* v. *Duke Power Co.*, 81 F. (2d) 986, 1001, 1002:

> "The power company has such an interest in the business as to justify its suit. The practical effect upon its valuable property interests is manifest. It has an interest far more weighty than that of a federal taxpayer, which in *Frothingham* v. *Mellon*, 262, U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078, was held to be too remote, uncertain, and insignificant to entitle him to injunctive relief against an invalid federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act of the administrator was invalid, but that they are in danger of sustaining a direct and substantial injury therefrom."

To argue that the petitioner's injury comes from the action of the towns and is the consequential and indirect result only of the Administrator's acts, is to ask this Court to forget Justice Field's admonition in *Ho Ah Kow* v. *Nunan*, 12 Fed. Cas. No. 6,546, at 255:

> " . . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men. . ."

The Administrator argued in the Court of Appeals—and the Court of Appeals seems to have adopted the argument—that what the petitioner really complains of is future competition which will result from the operation of the federal public works projects authorized and financed by the Administrator; that the operation of these plants by the towns will be lawful; and that, therefore, the petitioner cannot complain that the operation was brought about by acts of

the Administrator, a public official, even though these acts are without authority or justification in law. It is said that the public official owes no duty to the petitioner not to cause this injury to it.

This argument is in reality a confusion of three arguments: (a) that the respondents owe no duty to the petitioner; (b) that the injury complained of is not the proximate result of the respondents' acts; and (c) that the consequences to the petitioner, since they reach the petitioner through the medium of legal competition, are not legal injury. The first two arguments have already been answered. The respondents do owe petitioner a duty, recognized by this Court, not to act in the absence of lawful power or in abuse of authority to its irreparable loss. The respondents' acts are the proximate cause of the petitioner's injury since that injury is the inevitable and contemplated result of the authorization of the projects; indeed, is essential to their accomplishment as planned. The petitioner's business must be taken from it in order to repay the administrator. We turn then to the final argument—that because the injury comes through the operation of the plants, in which the towns may lawfully engage, the consequences to the petitioner are not legal injury.

The respondents do not and cannot argue that because the intervening acts of third persons are lawful, resulting consequences to a plaintiff cannot be legal injury. The cases cited *supra*, p. 24, negative any such argument. As Mr. Justice Holmes has said:

> "To sum the matter up in a rule, where it is sought to make a man answerable for damage, and the act of a third person is nearer in time than the defendant's to the harm, if the third person's act was lawful, it stands like the workings of nature, and the question is whether it reasonably was to be anticipated or looked out for; . . ." *Collected Legal Papers*, p. 134.

Nor can they argue that the consequences to the petitioner do not constitute legal injury because they reach the peti-

tioner through the competition of a rival. That the injury from competition is injury recognized by the law was expressly held by this Court in *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, 11. Similarly in *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515, a plaintiff was held entitled to question the authority of public officers to issue a license to a third person to enable it to compete with plaintiff. Here, as in the present case, the injury came through the act of the third person and consisted in the consequences of direct competition with plaintiff. This Court found no difficulty in determining that the consequences were legally injurious and that they were proximately caused by the acts of the public officers. It accordingly proceeded to decide the remaining question of the authority of the officers.

The respondents' argument is not, therefore, that either the legality of the intervening acts or the fact that they consist of competition renders the petitioner unable to question the legality of the respondents' act. Rather, it seems to be that nothing added to nothing makes something—that because the intervening act, which finally produces the injury, is legal competition, the consequences are not legal injury. Here, again, as might be expected, both authority and reason are against such an argument.

In the cases cited below the plaintiffs were electric utility companies; the injury of which they complained would reach them through the competition of proposed municipal plants; in all the cases *the operation* of the plants was within the legal powers of the cities; yet in all cases the plaintiffs were held entitled to question the legality of acts of third persons which would cause the competition and resulting injury to the plaintiffs. Thus in *Colorado Central Power Co.* v. *Municipal Power Development Co.*, 1 F. Supp. 961, the plaintiff was held entitled to question the legality of a contract between a construction company and a city for the construction of a municipal light plant, which was to compete with plaintiff's plant, on the ground that it vio-

lated statutes requiring that such construction contracts be let to the lowest bidder. So, too, whether municipal debt limits are being exceeded by a city in incurring indebtedness to build a competing plant, *Campbell* v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560; cf. *Oklahoma Utilities Co.* v. *Hominy*, 2 F. Supp. 849; whether prospective revenues from the municipal competitor are to be pledged in excess of the amount permitted by law, *Iowa Southern Utilities Co.* v. *Cassill*, 69 F. (2d) 703, whether the state competitor proposes to proceed pursuant to an unconstitutional statute, *Gallardo* v. *Porto Rico Ry. L. & P. Co.*, 18 F. (2d) 918, all are questions which have been held properly raised in a suit by one threatened with injury from the competition of the proposed plant, even though the municipality had unquestioned legal rights to operate a competing plant.

This principle is even more clearly shown by *Citizens Electric Illuminating Co.* v. *Lackawanna & Wyoming Valley Power Co.*, 255 Pa. 145. There a utility company was permitted to enjoin the defendant from selling electricity to another utility which was lawfully competing with plaintiff. The sale violated law, but there would be no injury except for the lawful competition. That the plaintiff had no right against the lawful competition was held to be beside the point. The issue was, rather, whether the defendant in furnishing electricity to the competing plant was violating law. And since it was, the court held that an injunction would issue.

Thus the argument that the petitioner has no standing to complain if subsequent operation of the plants by the towns is lawful falls to the ground. The petitioner can complain, regardless of the lawfulness of the operation, if the acts which cause it are in voilation of law. The Administrator owes the petitioner a duty not to cause petitioner injury by acts done beyond and without authority in law. If he breaches that duty, it avails him nothing that the impact of the injury comes from operation of the plants by third parties which may be lawful. It is the unlawfulness of his

acts and not of the towns' acts of which petitioner complains. This is not a suit to enjoin competition by the towns. They will be as free after as before any decree entered herein to engage in it. This is a suit to enjoin the unlawful acts of the Administrator which cause the injury to petitioner and which breach the duty which he owes them.

The cases cited by the respondents below in no way sustain their assertion that when injury is caused by competition which is in itself lawful, a plaintiff has no standing to attack the legality of acts of third parties which cause the competition. In all of these cited cases, although the plaintiff complained of injury from competition the infirmity in his case lay elsewhere and arose from well recognized principles of law. *Railroad Co.* v. *Ellerman,* 105 U. S. 166, on which chief reliance was placed below, was a suit by Ellerman, the operator of a wharf to enjoin the lessee of a railroad company from operating a wharf in competition with him. The railroad was a corporation, the powers of which included that of acquiring and using wharves for *railroad purposes.* Ellerman's claim, this Court said, came down to the contention that defendant's operation of the wharf infringed Ellerman's rights because the lease was beyond the corporate powers of the Railroad Company. But, this Court answered, only a stockholder or the state could raise the question of *ultra vires* under these circumstances; Ellerman had no interest in it. The corporation owed him no duty which it had not performed. The case is only one of many which hold that only the state, stockholders and, in some instances, creditors may question the violation of powers contained in a corporate charter. It has no applicability here.

In *Edward Hines Trustees* v. *United States,* 263 U. S. 143, and *Sprunt & Sons* v. *United States,* 281 U. S. 249, the plaintiffs' infirmity was twofold—it was not shown that the defendants' acts were the proximate cause of the injury complained of, and the plaintiffs were complaining, not that any rate charged to them was unlawful or that any competi-

tor was receiving preferential rates, but that a discrimination formerly applied against competitors was removed. In both cases carriers following proceedings before and orders by the Interstate Commerce Commission withdrew rates which had been disadvantageous to competitors of the plaintiffs. The plaintiffs, shippers who under the old rates had an advantage over competitors, brought suit to set aside the orders. But the Court pointed out that a judgment for the shippers would not restore the advantage previously enjoyed, because the order was no longer the cause of their trouble. The carriers had acquiesced in the order and put into effect new rates, the propriety of which the shippers did not and could not attack in the proceedings before the Court. In the *Hines* case, in which certain penalty charges which bore heavily on competitors of the plaintiff had been removed, this Court said;

> "It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered." (p. 148)

In the *Sprunt* case this Court similarly said:

> "The carriers who were respondents before the Commission filed the new rates, presumably because they now desire them. Nothing to the contrary is shown. So far as the carriers are concerned, it is as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission." (p. 256)

Driving the point home, this Court said further:

> "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so." (p. 258)

Thus it became unimportant whether or not the Commission's order had been the original cause of the withdrawal of the old rates. They had been withdrawn and, when these suits were filed, the carriers had put into effect new rates, which the plaintiffs did not and could not attack as unreasonable or prejudicial to them in these suits, and which it was not shown that the carriers were willing to change. These new rates, as this Court pointed out, did not subject the plaintiffs to any legal wrong merely because they did not continue the plaintiffs in a preferred position. That position was a mere incident of the rates which had been withdrawn and which for aught that appeared in the record would not be reinstated whatever judgment were rendered regarding the validity of the Commission's original order. Under such circumstances the plaintiffs were plainly without standing to question the legality of the order—a question which had become entirely academic.

In the present case no such situation exists. Here, the acts of the respondents in authorizing and financing the public works projects are the cause of the injury threatened to petitioner. These projects are designed and intended to supplant petitioner's facilities and to take over its business in the towns. It is only by doing so that the respondents will be repaid for their loan, and the gifts are to induce the construction. The injury will not occur if the loans and gifts are not made. Furthermore, petitioner is not complaining of a penalty or discrimination removed from another, but of a legal wrong done to it,—the invasion of its legal right to conduct its business free from interference or injury by respondents done without lawful authority.

In the *Chicago Junction Case*, 264 U. S. 258, this Court held the plaintiffs entitled to question the legality of an order of the Commission under circumstances not different in principle from those existing here. The Commission had issued an order authorizing the New York Central to acquire the Chicago terminal railroads. The New York Central could not do so under the law without this authority,

which if valid established public interest in the acquisition. The plaintiffs were competing railroads entering Chicago who contended that the order was void because there was no evidence to support the finding of public interest. The defendants—the Commission, the New York Central and the terminal railroads—contended that the plaintiffs had not the legal interest necessary to entitle them to challenge the order.

This Court said:

> "That they have in fact a vital interest is admitted . . . . The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here." (p. 266)

This Court then pointed out that prior to the order of the Commission the plaintiffs had a right—qualified it was true—to compete on equal terms with the New York Central for traffic originating on the terminal railroads. The fact that the right to this opportunity might be ended, without redress, by purchase of the terminal railroads by the New York Central under permission of the Commission, did not render plaintiffs without legal interest to question the validity of the Commission's act in granting the permission. If the order was without authority in law their qualified right to compete on equal terms had been impaired and irreparable injury done to their revenues.

The same is true here. Here, too, it is admitted that the petitioner has a vital interest in fact. The consequences to it, if the projects go through, are equally plain and disastrous. Here, too, its right to continue its business in the towns is qualified by the possibility that other facilities, lawfully constructed and operated, may take its business

away. But this does not affect its right to continue its business free from interference by the public officer without authority in law. He, no more than the Commission, can authorize projects designed to destroy its business, without authority in law,—much less can he induce and aid them by unauthorized loans and gifts of federal funds. This petitioner, like the plaintiff in the *Chicago Junction Case, supra,* has a special interest in the proposal and a clear standing to question the legal authority upon which it is sought to be justified.

Also in *United States ex rel. New York Warehouse, W. & T. Ass'n.* v. *Dern,* 68 F. (2d) 773, 774, the defect in the plaintiffs' suit was, as the Court of Appeals for the District of Columbia said, that "Their interest is not personal and direct, but indirect and remote". That was a mandamus proceeding brought by warehousemen in New York to cancel a lease of a government warehouse in that city made by the Secretary of War in alleged violation of procedure established by statute. The plaintiffs did not contend that they were entitled to the use of the property, or that the lease contemplated or required any interference with their business. Their only interest was that the lessee might procure business which otherwise might go to them, although it might also go to others. There were many persons engaged in the same business in the port of New York dealing with customers from all over the world. The interest of these plaintiffs in the lease of one potential competitor was negligible, remote and indirect. The principle involved is clearly inapplicable to the present case.

The principles involved here are simple and fundamental. Petitioner's business in the towns is to be wholly destroyed by systems authorized and financed by respondents, without authority in law, which are designed to and will supplant and eliminate petitioner. It is basic to the projects that the income which they now receive shall go to repay these respondents. Here there is no lack of direct causation; no absence of legal right in petitioner to be free from

respondents' unauthorized interference; no indirect or remote interest at stake. Their suit is to stay the shaft drawn by respondents and aimed at the jugular.

II.

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT, AND THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935 ARE UNCONSTITUTIONAL DELEGATIONS OF LEGISLATIVE POWER.

1. Petitioner's Position Stated.

The respondents claim authority for one of the loans and grants from Title II of the National Industrial Recovery Act and for three of them from the Emergency Relief Appropriation Act of 1935. The former act is divided into two parts. Title I sought to delegate power of Congress derived from the Commerce Clause to the President. Title II seeks to delegate the power to promote the general welfare through the expenditure of federal funds. Title I was declared unconstitutional by this Court because, as the concurring Justice put it, the authority "in effect is a roving commission to inquire into evils and upon discovery correct them". And again, "If that conception shall prevail, anything the Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer." *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 551, 553.

Title II, especially as modified by the Act of 1935, is even more sweeping in the power conferred. To the extent of three billion dollars—with another five billion added by the later Act—anything which the Congress may do within the General Welfare Clause for the betterment of business, and even beyond that, may be done by the President or his deputy. Here again "no such plenitude of power is susceptible of transfer".

2. The Power Attempted to be Delegated.

The authorizing words in Title II of NIRA are found in Section 203 (a):

> "With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; . . ."

Section 202 reads:

> "The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include *among other things* the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control . . . (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation, or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended . . ." (Italics supplied.)

In fact, as the Administrator testified, no program was first prepared from which projects were taken, but the accumulation of approved projects constituted what he called the program. He said:

> "The program from time to time was made of such projects as had been approved from time to time. The comprehensive program fluctuated from day to day, according as we approved or did not approve further projects. That was the only comprehensive program that we had. We offer now a comprehensive program of public works. It had been developed. It is there." (R. Vol. II, 515.)

Since, therefore, Section 202 was merely suggestive, since the types of projects there mentioned might be undertaken "among other things," the statute contains no more definite guide to what should be done than the term "public works project".

The term in the 1935 Act is equally general. That act refers to "projects of States, Territories, Possessions, . . . municipalities". It is true that there is an apparent limitation to the extent that it must be a project where in the determination of the President not less than 25 per cent of the loan and grant is to be expended for "work". But respondents argue, and the Trial Court held, that "work" means labor either at the site or in the manufacture or transportation of materials used. Upon such interpretation the limitation disappears. Upon any other, the present projects are unauthorized, since the respondents themselves proved, and the Court found (R. Vol. I, 467), that only half the specified percentage would go for direct labor.

So the question is whether an authorization to the President to spend billions upon "projects" or "public works projects" furnished any guide or standard, in the light of history or recent experience, as to what to do.

It is well at once to notice that Administrator Ickes himself has been careful to point out that there was no plan

or guide, and his word on the subject should be most convincing.

On June 13, 1935, Mr. Ickes testified before the Senate Committee on Commerce on the question of the feasibility of establishing a national planning board. See HEARINGS BEFORE THE COMMITTEE ON COMMERCE ON S. 2825, UNITED STATES SENATE, 74th CONGRESS, 1st SESSION, June 13, 1935. He opened his remarks with this statement:

> "When I was entrusted with the administration of Public Works there was no plan on which we could proceed. We had to start from 'scratch'." (p. 4)

And he closed his remarks with this statement:

> "Such a plan (i. e. long-range planning) would have been of great help to us when we came to a consideration of our Public Works program, for *there was nothing at all to be used as a guide and we had to start out cold.*" (p. 6) (Italics supplied.)

Three days later, on June 16, 1935, the Administrator issued through the press section of PWA an article surveying his two years' experience. As summarized in the record he stated:

> "PWA had to chart its own course, set its own precedents, pioneer its entire program.". (R. Vol. II, p. 428.)

In the same year Mr. Ickes published his book entitled *Back to Work*, which is of special significance because it is one of the few documents available in this country or elsewhere which records the actual story of a large scale govern. ent spending campaign. In the first chapter he records the formation of PWA, and, in telling of the preliminary organization thrown together as the NIRA sped through its legislative course, he says:

> "This group faced a tremendous job. Never before in any country had an organization similar to theirs been formed. *They had nothing to go upon; no prec-*

> *edent, no set of rules upon which to model their plans.*" (Italics supplied.) (*Back to Work*, p. 18, this book appears as Defendants' Ex. 12 attached to the Record.)

In the second chapter, after recounting the meetings of the Special Board for Public Works to formulate the policies PWA was to pursue under the Act, he adds:

> ". . . we were in virgin territory, faced with the necessity of blazing our own trails through the mountains and the valleys of policy, of cutting through the legal underbrush to our goal." (*Back to Work*, p. 47.)

And in the third chapter, dealing with the efforts to organize PWA, he recurs to the theme:

> "To undertake this gigantic task we had no machinery at hand and no precedent to guide us. The seas were uncharted. If there was any works plan in existence anywhere, we were not informed of it." (*Back to Work*, p. 51.)

(a). ***History Shows that the Term, "Public Works Project", Did Not Furnish an Objective or a Path by Which to Attain One.***

It was not by chance or oversight that the Administrator found no well-beaten path. The fact is that there had, indeed, never been anything like Title II of the NIRA in any country. "Public works" had been an occasionally used term of many meanings. There had been no experience with, and no appreciable thought about a program which would embrace almost every conceivable undertaking that any public or semi-public body wished to engage in, such as the NIRA allowed. Still less had there been experience or thought which made the word "projects" suggestive of any type or character of undertaking. The word "projects" might as well have been the word "things". Indeed in Sec. 202 of the NIRA it was stated that the permissible classes should be "among other things".

The National Planning Board of PWA secured the services of John Maurice Clark, one of our most eminent economists, to study the planning of public works. In 1935 his study was published by the Government Printing Office, under the title *Economics of Planning Public Works*. It contains one of the few available surveys of the history of government spending to provide work.

Professor Clark points out that in Elizabethan England there was a fairly liberal poor law whereby the various parishes kept materials on which the poor could be set to work. (p. 3) This was succeeded by a strict period down to the Napoleonic Wars when again a more liberal policy prevailed consisting of outdoor relief in cash and a certain amount of subsidized private employment. It was a time of "indiscriminate liberality", stimulated by the fear of revolution. (p. 4) With 1834 a reaction occurred, and the work house, a semi-penal institution, was adopted, where the poor were set to work breaking stone. Outdoor relief was virtually prohibited, and sporadic outside relief works were almost as bad as the work house. (p. 4) These few outside works consisted of regular city work, and there was some road and sewer construction; but the bulk of it was a sort suggestive of made-work—grooming of parks, etc. (pp. 4-5) There was no basic change in the official theory, founded on the work house, all during the nineteenth century. There was only spasmodic resort to relief works. (p. 5) The lone example of an experiment that rose materially above the level of the work house was carried out in Lancashire during our Civil War, marked by a sewage and paving enterprise using some 8,000 men; but this experiment was not carried forward and relief work during the next depression "rejected the only points worth having in the Lancashire scheme". (p. 6)

In the meantime France, following the Revolution of 1848, had made a spectacular but abortive effort to give

employment, which probably reached only 6,000 men and ended in riot and bloodshed. (p. 5)

It will be noted that this entire experience had to do only with the problem of providing a pittance to men out of work, and the English were almost exclusively preoccupied with the question of making idleness as unattractive as possible. Professor Clark concludes, "At present the English are inclined to rely on the system of unemployment benefits, rather than on public works in any form, for the relief of unemployment." (p. 7)

With the beginning of the twentieth century, some thought was devoted to a different question, and between 1905 and the depression in England of 1920 various proposals were advanced, both in England and France, suggesting the "reserving" of ordinary governmental expenditures and ordinary governmental works in such a way that what would normally be done in good times would be postponed until dull times, when it would be done, not as poor relief, but under ordinary employment conditions. (pp. 9-10) The proposal presupposed only mild cyclical fluctuations which would be smoothed out to some extent by reserving the regular government expenditures until the dip of the curve. Such expenditures might be for anything from government printing to post offices. (p. 10) The Webbs in England had worked out the theory on paper. Certain attempts have been made in France to carry out this type of policy but results are as yet doubtful. (p. 9) In England during the 1920 depression $125,000,000 were granted for public works, but chronic depression since has not allowed the theory to be tested. England is now engaged in a large housing program, "but no general drive for expanded public works similar to that in the United States has been made". (p. 9)

In Germany after a wild, hit or miss period of local projects financed largely by American loans, there was a time of retrenchment from 1930 to 1932; then the Brüning government resorted to inflation to start a planned pro-

gram though it was not much greater in actual amount than in 1930. (pp. 10-11)

And in Italy in recent times there has been an effort, undertaken without much reference to costs or without weighing results, and geared to some extent to the prevention of actual disorder, whereby road and reclamation developments have been carried out, together with excavation of Roman remains. (p. 7)

This is the sum of Professor Clark's findings for the period of four hundred years. Out of all that time there emerges only one theory of public works, aside from the work house theory, *and that was a theory never consistently put into practice*—the theory entertained by the Webbs and a few others that the deferring of normal expenditures until dull times might tend to smooth the curve of milder depressions. In the United States the President's Conference on Unemployment in 1921 gave general endorsement to such an idea; some of the States had adopted plans for "scheduling" public works with few tangible results; and under the Federal Employment Stabilization Act of 1931 (46 STAT. 1084) a six year "schedule" of federal works was drawn up that was mildly consistent with the Webbs' theory. (p. 11) But it is safe to say that up to 1933 no man, living or dead, had seriously contemplated anything like the measure embodied in Title II of the NIRA. History affords no well-beaten path.

Aside from the conglomerate applications for RFC loans, the *only thing* that PWA was able to look to was the six-year "schedule" under the Act of 1931, and *this was of temporary assistance only with respect to conventional projects of the Federal Government.* The vast area beyond was uncharted. (*Id.*, p. 11; see also NATIONAL PLANNING BOARD OF FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, FINAL REPORT, 1933-1934, p. 20; (Government Printing Office.) And even within its domain the six-year schedule was "very limited in scope". NATIONAL RE-

SOURCES BOARD, REPORT, Dec. 1934, p. 55, (Government Printing Office).

(b). *Subsequent Experience Under the Acts Here Involved Shows That the Term, "Public Works Project", Failed to Furnish Either Guide or Standard.*

In Professor Clark's study, *supra,* he suggests that customarily public works are regarded as durable goods, primarily fixed structures. But he points out that there is a strong compulsion to extend the conception as far as possible into the field of intangible service. (*Op. cit.* p. 2.) And, it may be asked, why not, when a statute authorizes "projects of municipalities"?

In March, 1934, the Administrator submitted to the Senate a list of federal and non-federal projects approved under the NIRA as of January, 1934. SENATE DOCUMENT No. 167, 73rd CONGRESS, 2nd SESSION, Defendants' Ex. 10, attached to the Record. Upon thumbing through the pages, one finds that the following are a few of the "public works" authorized by NIRA.

Tools, materials, salaries and traveling expenses for technical direction of community sanitation programs in twenty-one states. (p. 22) Draining malaria swamps in Puerto Rico. (p. 28) Bathouses and latrines at Fort McClellan in Alabama. (p. 33) Reconditioning and preservation of ammunition in sixteen states and territories. (p. 38) Drinking fountains in Arlington Cemetery. (p. 39) Night lighting at Maxwell Field in Alabama. (p. 45) A sprinkler system at March Field in California. (p. 49) Clearing yard of debris at Norfolk Navy Yard. (p. 58) One hundred cedar posts for the Geological Survey. (p. 65) A plank walk at Kotlik, Alaska. (p. 73) Expenses for field investigations to determine customary wage rates by the Bureau of Labor Statistics. (p. 121) A silo at Annadale, N. J. (p. 125) An ice-plant at Beaver, Nebraska. (p. 125) A fence at Burlington, Vt. (p. 127) A fire alarm at Charlotte, N. C. (p. 127) "Miscellaneous"

at Cleveland, Ohio. (p. 128) A culvert at Des Moines, Iowa. (p. 129) A warehouse at Fort Pierce, Fla. (p. 131) A shed in Harris County, Tex. (p. 133) A dry dock in Tampa, Fla. (p. 144) A golf course in Waterbury, Conn. (p. 146)

Aside from these are allotments to railroads for equipment and repairs (p. 147) and to limited dividend corporations for housing. (p. 147) Again there are allotments to the Federal Power Commission for a study of electricity distribution costs (R. Vol. II, 385) to the Coast Guard for repairing storm damage "without awaiting the convening of Congress" (R. Vol. II, 388), to the National Planning Board for the stimulation of local planning. (R. Vol. II, 426) Then there are allotments for soil-erosion control and recreation facilities. (R. Vol. II, 448) And $400,000,000 are allotted to the Civil Works Administration. (*Id.*)

The allotment to the Civil Works Administration so reveals the extraordinary delegation in the NIRA that it bears special notice.

On November 9, 1933, the President promulgated an Executive Order as follows:

> "By virtue of the authority vested in me under title II of the National Industrial Recovery Act of June 16, 1933 (Public No. 67, 73rd Cong.), and for the purpose of increasing employment quickly.
>
> "(1) I hereby establish a Federal Civil Works Administration, and appoint as Administrator thereof the Federal Emergency Relief Administrator, *as an agency to administer a program of public works as a part of, and to be included in, the comprehensive program* under preparation by the Federal Emergency Administration of Public Works, which program shall be approved by the Federal Emergency Administrator of Public Works and shall be known as the 'civil works program.'
>
> "(2) The Federal Emergency Relief Administrator, as head of the Federal Civil Works Administration, is

authorized to *construct, finance, or aid in the construction or financing of any public works project included in the civil works program* and to acquire by purchase any real or personal property in connection with the accomplishment of any such project and to lease any such property with or without the privilege of purchase.

* * * * * * * * *

"(4) For the purposes of this order, there is hereby allocated to the Federal Civil Works Administration the sum of $400,000,000 out of the appropriation of $3,300,000,000 authorized by section 220 of the National Industrial Recovery Act and made by the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (Public No. 77, 73rd Cong.). (Italics supplied.)

FRANKLIN D. ROOSEVELT.

"The White House
November 9, 1933."

Thus the words of the NIRA are repeated and an entirely new "program" is launched within the PWA program. The Court will recall the effort during the winter of 1933-34, when men were put to work upon literally *every conceivable kind* of project, and by far the greater portion of these were "projects of municipalities" and local subdivisions. MONTHLY REPORT OF THE FEDERAL EMERGENCY RELIEF ADMINISTRATION, DEC. 1 TO DEC. 31, 1933, p. 18, (Government Printing Office). These projects included such things as painting guard rails and fences, trimming shrubbery and painting street signs (*Id.* p. 19), brush removal and bridle paths and wading pools (*Id.* p. 20), demolition of old buildings (*Id.* p. 20), tick eradication and moth control (*Id.* p. 21), artists' projects, drafting maps, revising town ordinances, copying old records, and indexing books. (*Id.* p. 23)

Since all this was done under precisely the same statutory authority that is now in question—the "public works project" provision of Sec. 203 (a) of the NIRA—it is apparent that that term did, indeed, acquire a meaning as

broad as the word "anything". Thus insofar as the statute is concerned the central words become absolutely indefinite, *and the language of the Act of 1935 is not restrictive but even broader.* In sum, the legislation says bluntly that whenever a public body wants to do a "thing" the President in his discretion may finance that "thing".

These examples of the kinds of projects which were included under NIRA gives an indication of the lengths to which one is inevitably driven in defining the word "public works project", or in ascertaining what a public works program can amount to when it is the sort authorized by the NIRA. The point made by Profesor Clark, *supra*, is a very real one. From the multifarious types of large, fixed structures, such as post offices or city halls, one is immediately taken into the ramifications of structures and services, leading inexorably to the conclusion that as a matter of cold fact the word "public works" in the NIRA and, much more so, the word "project" in the Act of 1935 was limited only by the interaction between all the wants of public bodies (and even some private bodies) and the integrity and wisdom of the Administrator. Nothing had ever happened prior to June, 1933, that was comparable to this in scope and variety.

It is not only that the term "public works" or "project" is an indefinite term. Quite aside from that there was no experience with a program of this multitudinous character. It is no doubt true that a city here or there had at some time built a silo, and that another city had at some time built a plank walk. But there had never been an effort to carry out a program that ran virtually the entire gamut of things that municipalities or states or other public bodies might want to undertake. No well-beaten path of experience gave meaning or limitation to the scope of the program or the character of its items.

Counsel for respondents in oral argument in the Court below attempted to find some limitation upon the appar-

ently infinite discretion which this Act permits to the Administrator. Counsel was unable to state what the limitation was but merely that in his opinion there was one. He said:

> "Section 202 of title II (NIRA) continues and shows that Congress clearly intended that a broad and comprehensive program should be initiated and undertaken. They used the language:
>
> " 'and any publicly owned instrumentalities and facilities,'
>
> "That is limited. It does not mean a grocery store. It does not mean a filling station. It does not mean a lot of things. It means just what it says,
>
> " 'publicly owned instrumentalities and facilities.' "

Counsel did not inform us why the words quoted did "not mean a filling station". It could not have been because filling stations are never publicly owned or never constitute a project of a state or municipality. The recent case of *Standard Oil Co.* v. *Lincoln*, 275 U. S. 504, involved the very operation by a municipality of filling stations so casually referred to by counsel. Furthermore, in view of what states and their political subdivisions have undertaken to do, we do not wonder that counsel for the respondents has not the temerity to suggest what are the things which the statute would not permit. For instance, states and their political subdivisions have owned and operated ice plants, *Denton* v. *Denton Home Ice Co.*, 119 Tex. 193; railroads, *United States* v. *California*, 297 U. S. 176; liquor stores, *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; warehouses, grain elevators, flour mills, real estate developments, and banks, *Green* v. *Frazier*, 253 U. S. 233; coal, wood and fuel yards, *Jones* v. *Portland*, 245 U. S. 217. See also, GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE, REPORT OF INVESTIGATING COMMITTEE, PURSUANT TO HOUSE RESOLUTON 235, HOUSE REPORT No. 1985, 72nd CONGRESS 2nd SESSION.

The fact of the matter is that there is no limitation contained in or deducible from the words of the statutes. This is clearly brought out in the report of the National Resources Committee for December, 1936, which the President sent to Congress with his message of February 3, 1937. In that Report the Committee said:

> "The definition of public works has been expanded. Public work now includes the collection of basic data, mapping and preparation of plans. The term also covers a variety of services such as forestry, pest control, soil conservation, housing and rural electrification. The list has been still further expanded in the efforts of the Works Progress Administration to provide useful work for persons on relief in accordance with the principles established by the President."

The Court will note in this quotation that the principles referred to have been established not by the Congress, but by the President.

3. Congress Cannot Delegate Its Power to Spend for the General Welfare.

The government has made some contention heretofore that there can be no unlawful delegation of legislative power here because the question is one of the objects for which money shall be expended, that Congress exhausts its functions when it authorizes the President to expend up to a certain sum of money, that the amount of actual expenditure within those limits and the use to which the money shall be put are functions of the Executive. The argument reduces itself to this: that the Congress has exhausted its function when it says "up to $5,000,000,000.00 for the President, if he wants it, to do with it what he will".

There seems no support whatever for the government's theory. Admittedly the power to do what is being done here is based upon Clause 1 of Section 8 of Article I of the Constitution. The power given by that clause, whatever it

is, is a power given to Congress, not the President. The determination of what is for the general welfare, and how the general welfare is to be subserved, is a legislative, Congressional function. So says Clause 1.

It was not by chance that the Constitution reposes in Congress plenary power over money raising and expenditure. On the contrary, the men of 1787 were placing the seal of culmination on the struggle of the people for complete power over the Executive which had begun centuries before and had been marked by steady gain.

The struggle raged over three issues: the power of the King to raise revenue at his will; the power of the King to dispense with sessions of Parliament for long periods of time instead of having to return to it regularly for revenue; the power of the King to spend money for whatever purposes he wished.

The Revolution of 1688 marked the final ascendancy of Parliament, for it appears that by that time it had been established that Parliament had the ultimate power over the levying of taxes and the designation of the objects of expenditures, with the right of periodic assembly.

Creasy in *The Rise and Progress of the English Constitution* says (pp. 293-4):

> "In addition to this important guarantee (the mutiny act), for the regular meeting of Parliament, a system of settling the royal revenue was established in *William's* reign, which necessitated the observance of the same constitutional principle. *The House of Commons then determined no longer to vote to the crown certain general large sums of revenues to be applied to particular purposes, according to the royal discretion; but they appropriated specific parts of the revenue to specific purposes of government.* This principle had been previously attempted, but it is only since 1688 that it has been strictly enforced." (Italics supplied.)

This victory of the people over the corruption and waste of an irresponsible sovereign was dearly bought and

jealously maintained, and the thought of political theorists in the period of our Revolution and the establishment of our Constitution was much occupied with this necessary check by the representatives of the people over the King. The writings of the Frenchman, De Lolme, in this field of English constitutional theory were familiar at the time of the Convention.[1]

When the Constitution was established there was no problem of people *versus* King, for the people had seized all the power. Hence the question was one of distributing the power between the various departments of the government, and of providing not merely that ultimate control should repose in one or the other branch but that each branch should have certain exclusive powers, with the correlative duty to discharge them and not to pass them to the other branches. Thus it came about that the ultimate powers of the Parliament to make laws, including legislation upon the spending of money as well as the raising of money, were not only made powers of Congress but, by our Constitutional theory, the powers of Congress exclusively.

Hence, as Parliament in 1688 asserted its right that the King could not take public funds and apply them to this

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[1]De Lolme, who wrote extensively on all phases of English political theory, sketches the outlines of the Parliamentary power in *The Constitution of England*, published in English first in 1771 and now available in the *Chandos Classics* (London and New York, 1873). See pp. 167-182, 237. He shows that the only ultimate check the Parliament had over the King was its power over the revenues, and that, first by attaching conditions and finally by detailing more specifically how the money was to be spent, the grants to the King took the conventional form of laws, pp. 173-174, with the Parliamentary will enforced by winning the power of impeaching the King's agents. See pp. 179-180.

In a footnote at p. 349 the author mentions that he discussed these Constitutional problems with Dr. Franklin some months before his return to America.

The questions of the relation of the King to the legislature with respect to the raising and spending of revenue were placed in the forefront by the Colonies' disputes with the mother country. See pp. 348-350.

or that purpose as he pleased but only as Parliament permitted, so our Constitution of 1789 requires that it is not only the right but the *duty* of the legislative branch to prescribe whether this or that purpose shall be subserved by expenditures of public funds. And when Congress says in the Act of 1935 that the President may, if he wants to, spend $600,000,000 for the CCC, or $100,000,000 for rural electrification or $900,000,000 for "projects" of "municipalities" or the entire $4,880,000,000 for aid to farmers or for the administration of the AAA, principles founded in a centuries-old struggle with the caprice and injustice of absolutism have been violated.

The courts of the states, in many instances dealing with a constitutional structure like that of 1789, have been fully aware of this struggle and have not been false to its plain dictates. As early as 1863 the Supreme Court of Indiana reviewed the Parliamentary history in a searching opinion and concluded that in that historic background the division of powers meant "the giving to the legislative power alone the right, and imposing upon it the duty, of designating, periodically, the particular demands against the state, or other objects, to which the moneys in the treasury shall be, from time to time, applied, and the amount to each. Opinions Att'y Gen. Vol. II, p. 670. And it is a great and important principle not to be lightly violated." *Ristine* v. *State ex rel. Board of Commissioners of the Sinking Fund,* 20 Ind. 328. See also *State ex rel. Norfolk Beet Sugar Co.* v. *Moore,* 50 Neb. 88; *Jackson* v. *Gallet,* 39 Idaho 382; *Clayton* v. *Berry,* 27 Ark. 129; *State ex rel. Pine* v. *La Grave,* 23 Nev. 25; *Hett* v. *Portsmouth,* 73 N. H. 334.

The most recent pronouncement was that of the Nebraska Supreme Court, on Sept. 20, 1935, in *Smithberger* v. *Banning,* 129 Neb. 651. State statutes had appropriated $4,000,000 to the state assistance committee. This committee was given the power to spend the funds for persons eligible, under federal legislation, "to work relief, direct relief, old age assistance, assistance to dependent mothers

and children, unemployment insurance, health of mothers and children, public health or related matters of security and welfare, and public works, especially roads, by the use of work relief". This was held an unconstitutional delegation of power to the state assistance committee. The Court said, at pp. 656 and 657:

> "There is no provision in any of the bills mentioned that fixes any standards for the guidance of the state assistance committee or the board of educational lands and funds. The committee and board above mentioned have an arbitrary and unrestricted discretion to allocate the $4,000,000 to any of the purposes set forth in the acts under consideration, with the single exception that old age pensions are to be given a preference. Under these acts, the board and committee have the power, if they see fit to do so, to allocate the whole fund to the payment of old age pensions and unemployment insurance without the requirement of the making of any findings of fact under standards and tests provided for in the act. Such provisions amount to a delegation of legislative power. Under section 1, art. 2, and section 1, art. 3, of the Nebraska Constitution, the legislative power of the state is vested in the legislature and cannot lawfully be delegated to any board or committee."

The court then analyzed at length the decisions of this Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 and *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, with this significant conclusion, at p. 660:

> "The above cases have particular application in principle to the case at bar. In the Nebraska acts, there are no limitations, standards, rules of guidance or criterion for the guidance of the state assistance committee and the board of educational lands and funds in allocating funds for old age assistance, unemployment relief, mothers' health, unemployment insurance, and other forms of relief therein enumerated. There is no requirement that the administrators of the acts find certain facts in determining for which of

> the various purposes allocations should be made and no basis for determining the amount to be allocated to each or any of the purposes therein set forth. This is all left to the discretion of the state assistance committee. Under the authorities hereinbefore cited, this constitutes a delegation of legislative functions to an administrative board."

The Court likewise held invalid on the same grounds the provision that the collection of certain taxes to raise the $4,000,000 might be terminated by the governor if Congressional social securirty legislation, not yet passed, required less than a $4,000,000 contribution from Nebraska. Thus to permit Congress, an agency other than the state legislature, "to determine the amount to be raised by the tax" is a delegation of legislative power. (p. 664)

In sum, the respondents must show that the authority delegated to them by Congress is an authority to execute a law providing for the general welfare, and not an authority themselves to legislate for the general welfare. One could desire no more eloquent testimony to the legislative character of the power delegated to the President than the President's executive order appropriating an additional $800,000,000 to these respondents, thus practically doubling the amount available to them:

> "EXECUTIVE ORDER
>
> "WHEREAS I find it necessary, in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 74th Congress), to increase by $800,000,000 the limitation of $900,000,000, contained in clause (g) of section 1 of the said Act, on the amount which may be expended under the Act for loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia and self-liquidating projects of public bodies thereof; NOW, THEREFORE, by virtue of and pursuant to the authority vested in me under the said Emergency Relief Appropriation Act of 1935, it is

ordered that the said limitation be, and it is hereby, increased from $900,000,000 to $1,700,000,000.

FRANKLIN D. ROOSEVELT.

"The White House
September 21, 1935"

Without findings, in a manner which may be perfectly arbitrary for all that appears in the order or in the Act of 1935, defying scrutiny by the Comptroller General, the courts, or the Congress itself, the President thus exercises powers that Parliament had won for itself nearly three centuries ago.

It is beside the point to cite, as respondents have done in earlier cases, instances where Congress has appropriated lump sums *for specific purposes* leaving the Executive discretion as to the time, place and manner of its disbursement. In all of such cases the object of the expenditure is clear and no question arises as to the delegation of a power conferred on Congress.

For instance, the Act of June 17, 1902, c. 1093, (32 STAT. 388), cited by this Court in *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 322, as an illustration of discretion properly conferred on the executive branch, set aside a special fund composed of moneys received from the sale of public lands in specified states to be used for the reclamation of arid lands in those states, the Secretary of the Interior to determine what projects were practicable and advisable. Here there was no vague direction to spend the money for the good of the country, but a precise specification of the object of expenditure, the area within which it was to be made, and a direction to the Secretary to determine the place and time of the projects on the basis of practicability. In the present instances the entire plenitude of the Congressional power to promote the general welfare with these vast sums is sought to be transferred to the President.

4. Congress Has Not Ratified the Acts of the Administrator Here Challenged.

In their brief in opposition to certiorari (pp. 23-24) respondents argued that a certain act of Congress amounted to an approval or ratification of the conduct of the Administrator in authorizing the loans and grants here involved.

We point out in Section IV, *infra*, p. 66, that Congress has no power under the General Welfare Clause to authorize the acts of the Administrator here in question, and that to do so would violate the limitation of the Tenth Amendment. That Congress has no power to ratify an act which it could not authorize in the first place is too obvious to need argument.

The facts from which this claim of ratification is sought to be spelled out are as follows:

In response to SENATE RESOLUTION No. 235, 74th CONGRESS, 2nd SESSION, the Administrator on March 6, 1936, furnished the Senate with SENATE DOCUMENT No. 184, 74th CONGRESS, 2nd SESSION, a list of approved projects involving the production or distribution of electric power or gas, among which were listed those here involved.

On June 22, 1936, the Emergency Relief Appropriation Act of 1936 (49 STAT. 1608), *infra*, p. 88, was enacted providing in part as follows:

> "In order to increase employment by providing for useful public works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects. . . ."

Respondents cannot, of course, argue that Congress expressly ratified any acts of the Administrator. Both the

73rd and the 74th Congress knew how to ratify acts of administrative officers when they wished to do so. In the Gold Reserve Act of 1934, Sec. 13, (48 STAT. 337, 343), the 73rd Congress provided:

> "All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed."

And in the Act of August 24, 1935, c. 641, sec. 21 (b) (49 STAT. 750, 771),—amending the Agricultural Adjustment Act—the 74th Congress enacted that processing taxes theretofore imposed by the President or by the Secretary of Agriculture—

> "are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress."

Respondents do not contend that Congress ratified the Administrator's acts by any such plain action as the above. Nor do they contend that the ratification was by specific appropriation to these specific projects as in *Wisconsin* v. *Duluth*, 96 U. S. 379, 386, and *United States* v. *Arizona*, 295 U. S. 174, 186. Nor do they argue that the specific administrative action here questioned was specifically mentioned in any act of Congress, and, in this way, approved as in *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, and *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297. The alleged ratification is unlike any heretofore acknowledged by this Court. It amounts merely to the appropriation of a sum for grants to future projects—not those here involved—which future projects were described in the most general terms as of the general type and kind as those theretofore undertaken. The statement of the chairman of the

House Committee on appropriations (CONG. REC., Vol. 80, Part 9, p. 9791) in reporting the Emergency Relief Appropriation Act of 1936 makes it plain that he had no intention of ratifying anything and intended merely to release funds in the revolving fund of PWA for the making of grants, which theretofore could be used for loans only. No sweeping ratification of innumerable acts can or should be implied from such restricted and general language. Compare, *Herring* v. *Houston National Exchange Bank*, 113 Tex. 264.

III.

THE LOANS AND GRANTS ARE UNAUTHORIZED BECAUSE THE ADMINISTRATOR IN APPROVING THEM HAS APPLIED A STANDARD OR CRITERION WHICH CONGRESS HAS NOT AND COULD NOT VALIDLY PROVIDE.

Even those who would argue that in the purpose, mentioned in the statutes, to provide employment there is enough guide or standard for the Administrator "to turn the color of legal litmus paper" in favor of the validity of the acts, must go further and concede that, unless the Administrator *bona fide* approves projects to this end, in accordance with their desirability in the light of the national reemployment program, the so-called standard entirely disappears. For it is obvious that some modicum of employment must result from any construction for any purpose. If that inescapable modicum is sufficient authorization for the project, then there is no standard and the Administrator, indeed, has a roving commission.

So the very position of the respondents in endeavoring to sustain the acts requires that the Administrator be able to show that the standards which he applied were those which alone could, according to his contention, extend the general authorization of the acts to the particular projects. If the proof is conclusive that he applied a standard or criterion which, even on his own argument, Congress has not provided, and which it could not provide, he cannot

save himself by the argument that, anyway, he could not fail to create some employment whatever he did. Such an argument destroys his essential premise that he has a chart to steer by.

The petitioner submits that the record leaves no reasonable doubt that the Administrator in determining whether or not to make these loans and grants applied the sole test of whether doing so was or was not necessary to provide retail outlets for TVA power under the rate control of TVA. Speaking more broadly the criterion was whether or not the construction of these projects would provide a means for lowering intrastate electric rates in Northern Alabama by TVA competition. We begin, as the record does, with the application of the towns.

(1) Each application recites that the town will use TVA power; that the use and sale of such power at low rates will reduce electric light and power rates in other communities; that the resale rates will be at schedules prescribed by TVA. (R. Vol. II, 92-95, 97, 99-100, 109-111, 126-127.)

(2) In the official document, approved by the President, authorizing the loan and grant to Decatur the only reason stated for the project is "that the Tennessee Valley Authority has acquired the necessary lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy . . .". (R. Vol. II, 343-4.) In a similar document the Russellville project is described as "Construction of distribution system to distribute TVA energy". (R. Vol. II, 359.) The remaining approvals are silent as to reasons.

(3) The advancing of funds for these projects—"with a view to increasing employment quickly"—was delayed for a year and a half to enable TVA to purchase the petitioner's lines, in which case the projects would have been abandoned. (*Supra*, p. 8.) TVA's plan was to purchase and operate these distribution systems for a while, later selling them to the towns. (R. Vol. II, 142, 144.) But it

was essential that all the towns agree to its plan. One of them—Florence—rejected it. (R. Vol. II, 136-146.) PWA held these projects up while TVA conducted its negotiations. (*Ibid*) The Administrator wired the Mayor of Florence: "Lilienthal informs me all other communities in area affected have approved TVA plan that Florence alone is holding out. Policy Public Works is to support Tennessee Valley Authority . . . Administration will advance no funds to Florence for expenditures inconsistent TVA plan . . .". (R. Vol. II, 137.)

(4) When the first contracts were made between the Alabama towns and the Administrator (those with Sheffield and Decatur, now superseded) they contained provisions conditioning the loan and grant upon the towns making contracts with TVA to purchase its power and resell at rates prescribed by it.[1]

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[1]The provisions referred to are found in Vol. I of the Record at p. 83 (Sheffield) and at pp. 125-126 (Decatur), the latter being as follows:

> "13. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:
>
> . . . . . .
>
> "(f) *Rate and Bond Ordinances.*—If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the Ordinance providing for the authorization, issuance, and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator;
>
> "(g) *Tennessee Valley Authority Contract.*—If the Borrower shall not execute a valid contract satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority will supply electrical energy to the Borrower, will permit the Borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of an interest upon the Bonds, and to provide a reserve for new construction and contingencies, and will specifically per-

(5) Although the foregoing requirement was eliminated from the later contracts between PWA and the towns, Sheffield, as of March 16, 1936, entered into a contract with TVA for electric power, containing this provision:

> "6. *Resale Rates.*—In order to facilitate the disposition of surplus power generated by Authority and not needed by it in its operations, and in order to carry out the intention of Congress to encourage the more abundant use of electricity throughout the area in which municipality operates, municipality agrees to charge consumers the rates set forth for the several classes thereof in schedules B-1 to B-5, inclusive, of the said schedule of rates and charges, and not to depart therefrom except by agreement of the parties. Additional resale schedules for special classes of consumers or special uses of electricity may be added from time to time by agreement of the parties. The term 'contractor' in said schedule shall be construed to mean municipality. If it should appear that the rates provided for in said resale schedules with the surcharge provided for therein do not produce reve-

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mit the Borrower to apply and keep in effect for the first year of operation of the Project, and longer if necessary for the foregoing purposes, a surcharge of 10% on the domestic, commercial, and industrial resale rate schedule of the Tennessee Valley Authority, and for at least the three succeeding years a surcharge of 10% on the commercial and industrial resale rate schedule of the Tennessee Valley Authority."

When the cases were in the Court of Appeals on the first appeal (from an order dismissing the bills of complaint) the respondents moved to remand to the lower court for amendment of the pleadings and trial upon the amended pleadings, the ground of the motion being that new contracts had been entered into between the respondents and the towns since the appeal had been taken. (R. Vol. I, 77, 193.) The motions were granted. (R. Vol. I, 195-198.) In his brief in support of the motion to remand the Administrator stated that the provisions regarding rates in the former contracts with municipalities were eliminated in the later ones because of the decision of the District Court (the first decision) in *Greenwood County* v. *Duke Power Company*, 12 F. Supp. 70. The Administrator, however, denied that the District Court had correctly interpreted those provisions of the contract. See also Mr. Ickes' testimony at R. Vol. II, 512.

> nues sufficient to operate and maintain municipality's electric system on a self-supporting and financially sound basis, then municipality shall, by agreement with Authority, prescribe and enforce such changes in rates as will provide for the increased revenues necessary to place the system upon such a self-supporting and financially sound basis." ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1936 (pp. 224-225).

The contract is the standard contract used in agreeing with municipalities and cooperative associations to supply power for resale. (*Id.*, Appendix A. For statutory authority for such provisions see pp. 89-90, *infra*.)

This, then, is the record. The projects were justified in the applications of the towns as outlets for TVA power and subject to its rate regulations; they were described, so far as they were described at all, in the document submitted to and approved by the President as outlets for TVA power; they were delayed for eighteen months while TVA explored an alternative which would have scrapped the projects; and when the projects were finally approved, the towns were first required by PWA, and when that was removed by TVA, to submit to TVA control of resale rates.

The mere statement of these facts leaves no other conclusion possible than that whether the work should go forward or stop depended solely on the criterion of consistency with the TVA plan. There is not even a reference in the telegram to the Mayor of Florence to providing employment or to any national reemployment plan of which these projects were a part. Florence is scolded for "holding out"—not for funds to provide employment—but for a plan inconsistent with that of TVA. It is made plain that the Administrator will provide no funds—to increase employment quickly or otherwise—inconsistent with the TVA plan, a plan which, at that time, would provide no construction, but which it was his policy to support.

That this policy was no isolated one, but was a part of the Administrator's announced standard for determining

whether or not to advance funds for local electric systems is shown by the facts already recited, *supra*, pp. 9-12, and which will not be repeated. It is sufficient to say that that standard was not concerned with employment but depended on whether the project would result in increased use of electricity at lower rates.

In the Courts below the respondents have attempted to make an oblique reply to this record by insisting that the Administrator did not choose the projects but merely approved or disapproved those chosen by the municipalities and submitted to him, and that therefore he could not have any such policy as the record shows. Of course, the argument is beside the point. The subject under investigation is the standard for approval or disapproval, for determining whether a particular project fell within the general terms of the statute. But in these cases even the irrelevant argument stated above is not open to the respondents. For the record shows that the towns here involved and the counties in which they were situated submitted other projects as well as those here concerned. The record shows also, by respondents' own witness that the direct labor involved in such projects as public building, water works and sewers, which were those not approved, was far greater than any involved in the electric systems. (R. Vol. II, 562-563.) The projects submitted were as follows:

Name of Town	Type of Project	Amount of Requested Loan	Amount of Requested Grant	Reference
Decatur (Morgan Co.)	County Jail	$112,000	30%	Def. Ex. 10, p. 148
	School	10,000	30%	Def. Ex. 10, p. 148
	School (Total cost $30,000)		$13,500	Plaintiff Ex. 262, p. 3
Hartselle (Morgan Co.)	Extension of Waterworks	38,550		Def. Ex. 10, p. 182
	Cemetery	3,345		Def. Ex. 10, p. 182
	Sewers	50,000		Def. Ex. 10, p. 182
	Sanitary Sewer	31,000	25,364	Plaintiff Ex. 262, p. 5
Morgan County	Refrigerating Plant	41,250	33,750	Plaintiff Ex. 262, p. 5
Russellville (Franklin Co.)	City Hall	35,298	30%	Def. Ex. 10, p. 182
Franklin County	Waterworks Sewer	36,869	33,908	Plaintiff Ex. 262, pp. 3, 4
Guntersville (Marshall Co.)				
Marshall County	Street improvements Schools Sewerage	183,737.40	89,244.60	Def. Ex. 10, p. 148, Plaintiff Ex. 262, p. 5

So the Administrator did have and did make a choice between various possible projects. His choice emphasizes again that the standard he applied in making it was not to provide employment quickly but to provide an agency, under federal control, for the reduction of electric rates in Northern Alabama.

At the trial the respondents undertook to prove that, irrespective of standards applied by the respondents in approving the projects, their construction and the manufacture of the materials used would create some employment. This proof, however, amounted only to the generality that any construction or purchase—except purchases of real estate—must create some employment.

The respondents' witness was an official of the Bureau of Labor Statistics. (R. Vol. II, 542, *et seq.*) He testified that the principal unemployment during the depression was in the durable goods industries. At the request of the respondents he prepared computations of the amount of direct and indirect man hours involved in the erection of and production of materials for six completed power systems financed by PWA. All of these projects included steam or deisel power plants. (Those here involved have no power plants). The direct labor could be computed from the reports of contractors. (*Id.* 560.) The indirect labor had to be estimated The direct labor, —i. e., at the site—represented about one-tenth of the expenditure (*Id.* 562) and about one-fifth of the total labor estimated. (*Id.* 553.) It was much less than the direct labor furnished by other types of projects, such as building, waterworks, sewers, dams and roads. (*Id.* 562-563.)

The estimate of indirect labor involved in the manufacture of materials used was based upon studies made by the witness in 1935 (before which there was no reliable information) as to the amount of labor involved per dollar of final cost in the production of steel and cement, and incomplete studies of some other industries supplying materials. (*Id.*, 563-564.) These studies showed considerable variation between various plants depending on location, process, and rate of operation. No attempt was made in the estimate to ascertain from what plants or areas the materials were purchased, and the actual labor involved might vary from the general figures used. The witness would not say that any unemployed were put to work. (*Id.*, 564.)

The sum total of all of this is that on projects, substantially dissimilar to these, calculations were made, after the event and after the present cases had gone to trial, which disclosed a small amount of employment furnished at the site and an estimate that in the manufacture of the materials used, whenever and wherever that took place, a highly speculative amount of labor was involved. But no one can

say whether that labor contributed to the relief of unemployment, or whether the materials were furnished out of accumulated stocks or manufactured in areas or plants where there was no unemployment problem. So far as the direct labor is concerned Mr. Rau of the PWA Electric Power Board of Review testified that the "class of employment was too technical to be selected from the local unemployment situation . . . they could not be found in most communities". (R. Vol. II, p. 252.) In short, we are back where we started and have only stated in pseudo-scientific ponderousness that some small amount of direct labor is necessary to erect the systems and that the manufacturing of the materials either has involved or will involve other labor. But the testimony proves conclusively that the reference in the statutes to providing employment, as understood by respondents, furnished no guide or standard, and that in any event respondent was not guided by employment making factors in selecting these projects for approval.

What is said above applies equally to the President's so-called finding, contained in a letter to the Secretary of the Interior accompanying his approval of a large number of projects including those in Russellville, Guntersville, and Hartselle, *supra*, p. 6, that "not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project". The respondents insist that work referred to means work in the manufacturing of materials as well as on the job—since they, themselves, proved that only one-tenth will be spent for labor on the job. And they cannot claim that it means future labor, since the materials, or a large part may be already manufactured. Whatever may be said of this finding, as respondents insist that it must be interpreted, it is enough to observe that it could have been made of any conceivable project, and that it disposes finally of any contention that employment making potentialities of these projects were in any way the standard which led to their selection.

It is wholly beside the point to argue, as respondents do,

that the Administrator has a large field of discretion in the selection of projects and that a court will not substitute its judgment for his. It is true that he has a great field of discretion—so great, we argue, as to render the statutes void as delegations of legislative power. But, upon his own argument, he must exercise his judgment according to the guide or standard which he claims to find in the statutes—the making of employment. It is only when he acts *bona fide* within this field that he can claim that discretion has been legally exercised. When he boldly departs from this field, claiming that since he cannot fail to make some employment he need not think about it, and applies standards of efficacy in rate control, he is not doing what even he asserts that Congress told him to do.

It is a familiar principle that, although courts will not review the discretion of an administrative official exercised within its legal scope, they will grant relief if he applies rules or principles which are not authorized by law. In *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, the Interstate Commerce Commission applied principles of valuation not in accord with the statute. Although the Commission had vast discretion in the matter of valuation, it was held that its order must be set aside. In *Work* v. *Louisiana*, 269 U. S. 250, a statute authorized the Secretary of the Interior to transfer federal lands to states when certain conditions existed. When the Secretary added a condition not contained in the statute, he was enjoined. Similarly, in *Herkness* v. *Irion*, 278 U. S. 92, a Louisiana official was enjoined because he applied a non-statutory rule in refusing to issue the plaintiffs a license to manufacture carbon black. Closely related cases are *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474; *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638. There through a misconstruction of the statute the Commission refused to take jurisdiction in a matter involving discretion. Mandamus was held to lie to compel

the Commission to take jurisdiction, although its discretion, lawfully exercised, could not be controlled. See *United States ex rel. Chicago, Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 61; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 218; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; and *Commissioner of Patents* v. *Whitely*, 4 Wall. 522, 534.

In the present case the Administrator has clearly put his actions beyond the protection of the statutes as he himself construes them.

IV.

IF THE STATUTES BE CONSTRUED TO AUTHORIZE WHAT HAS BEEN DONE HERE, THEY ARE UNAUTHORIZED BY ANY POWER DELEGATED TO THE FEDERAL GOVERNMENT AND VIOLATE THE TENTH AMENDMENT.

To authorize what has been done here, it must be contended that Congress under the General Welfare Clause may spend for the construction of local electric distributing systems to be used to retail power produced by a federal agency at rates prescribed by a federal agency for the announced purpose of lowering electric rates within a state, when it appears that the only claimed connection with the national welfare is the generalization that some employment must result from the erection of the system and the purchase of the materials. Such an argument runs counter to plain and fundamental pronouncements of this Court.

It is too plain for argument that the control of intrastate electric rates, either directly through regulation or indirectly through competition, is a state function. The first principle which governs the intrusion of the federal power into a field normally reserved to the states was announced by this Court in *Florida* v. *United States*, 282 U. S. 194, 211-212:

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and

with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

The only justification claimed here would have to be the remote, collateral and speculative one that in the construction of the system some modicum of employment would be created and that this employment *might* tend to contribute to the relief of a national unemployment problem. Such a remote and collateral connection is not the clear justification of the exercise of the federal power which alone will sustain it. *Florida* v. *United States, supra; Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *Arkansas R. R. Commission* v. *Chicago, Rock Island & Pacific R. R. Co.*, 274 U. S. 597; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 546-8; *United States* v. *Butler*, 297 U. S. 1.

Furthermore, it would be plain under accepted canons that the purpose of the statute supposed was not to promote the general welfare but to regulate intrastate commerce. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." *Collins* v. *New Hampshire*, 171 U. S. 30, 34; *Hammer* v. *Dagenhart*, 247 U. S. 251, 275; *Hill* v. *Wallace*, 259 U. S. 44, 66; see also *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10. And it is "established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid

and cannot be enforced", *Linder* v. *United States*, 268 U. S. 5, 17.

It would be plain, if Congress expressly authorized the criteria and standards applied here by the Administrator, that they were not reasonably and naturally adapted to the effective exercise of the general welfare power. In fact, it would be apparent that they had nothing whatever to do with it. This conclusion would be irresistible when it was further shown, as it is here, that the creation of employment to aid the unemployed is at most a highly speculative and collateral result of the type of project contemplated and that even this is hindered rather than aided by the application of the standards used. In such a case this Court must conclude that "it is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business" wholly within a state, by coercing the petitioner through competition or the threat of it to charge rates approved by a federal authority. See *Hill* v. *Wallace, supra*, 66.

In *United States* v. *Butler*, 297 U. S. 1, 66-68, 87 the Court while adopting Story's construction of the welfare clause in preference to Madison's more limited construction stressed the fact that "the adoption of the broader construction leaves the power to spend subject to limitations"; that it may only be exercised for a general not local, national not state, purpose. *And the Court expressly held that the federal spending power cannot lawfully be made the means of controlling matters of local concern, or of exercising powers reserved to the states.* The dissenting Justices did not differ on this point. Mr. Justice Stone in his dissenting opinion said:

> "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. *Another is that it may not be used to coerce action left to state control.*" (Italics supplied.)

For the federal spending power to be used so as to invade the powers and perform the functions of the states would lead inevitably to the destruction of the balance between the general government and the states. A use of the federal spending power for such a purpose or, regardless of purpose, a use, which has that direct and necessary effect, is not a constitutional means of relieving unemployment.

In *Franklin Township* v. *Tugwell*, 85 Fed. (2d) 208, 221, (which the government did not seek to have reviewed by this Court), the same principle was declared by the United States Circuit Court of Appeals for the District of Columbia, as follows:

> "Thus we think it clear from the limitations placed upon the power of Congress to tax and spend for the general welfare that that power can never be used to destroy the federal balance established by the Constitution between the general government and the States, that that power may be exercised only within the limitations imposed by the Constitution, and not beyond, and that it cannot be directed to matters of local concern which belong exclusively to the States."

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 29, 30, the Court construed and limited the application of the National Labor Relations Act of 1935 so as to exclude any invasion of the reserved powers of the states over their local concerns. The Court said that unless so construed and limited in its application—

> "the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corp.* v. *United States*, 295 U. S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

The federal spending power like the other powers of the Federal Government must be exercised in the light of our dual system of government and our indestructible union of indestructible states.[1] Story, *The Constitution*, (3rd Ed., Sec. 416); *United States* v. *Butler*, 297 U. S. 1, 68. It must be exercised in a manner to "consist with the letter and spirit of the constitution". *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. And this prohibits any exercise of the power which would have the direct and necessary effect of invading the powers reserved to the states and impairing their separate existence and independent self-government. *Kansas* v. *Colorado*, 206 U. S. 46.

CONCLUSION.

For the foregoing reasons, it is submitted that the petitioner has legal standing to question the authority in law of the respondents to authorize and finance the projects here involved; that the respondents have no authority in any law of the United States to do what has been done here; that Congress could not confer such authority under the Constitution, and that, therefore, the decree of the United States Court of Appeals for the District of Columbia should be reversed and the cause remanded to the District Court of the United States for the District of Columbia with direction to enter a permanent injunction against the respondents.

Respectfully submitted,

PERRY W. TURNER,
NEWTON D. BAKER,
WILLIAM H. THOMPSON,
R. T. JACKSON,
DEAN ACHESON,
Attorneys for Petitioner.

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[1] This principle applies even more strictly to the federal spending power than to the other powers of the Federal Government, because the spending power, different from most of the other powers, involves only the power to spend, and, as Hamilton said does "not carry the power to do any other thing not authorized in the Constitution, either expressly or by implication". *Hamilton's Works*, (Const. Ed.) Vol. IV, p. 152.

APPENDIX.

I.

NATIONAL INDUSTRIAL RECOVERY ACT:

[PUBLIC—No. 67—73d CONGRESS]

AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY.

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

* * * *

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal

Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the "Administrator"), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate: *Provided*, That he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans.

SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed: *Provided*, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or mortorization of such Army

tactical units as he may designate: *Provided, however,* That in the event of an international agreement for the further limitation of armament to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units: *Provided further,* That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and/or executive officer.

SEC. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grant to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase; *Provided,* That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled "An Act to provide for the construction and equipment of an annex to the Library of Congress", approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission and in accordance with such Act: *Provided,* That in

deciding to extend any aid or grant hereunder to any State, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

* * * *

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

* * * *

SEC. 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be

used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

* * * * *

ISSUE OF SECURITIES AND SINKING FUND

SEC. 210. (a) The Secretary of the Treasury is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States.

* * * * *

APPROPRIATION

SEC. 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000.

II.

EXECUTIVE ORDER OF THE PRESIDENT, JULY 8, 1933.

ADMINISTRATION OF PUBLIC WORKS

Pursuant to the authority of "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

The White House
July 8, 1933.

III.

EXECUTIVE ORDER OF THE PRESIDENT, AUG. 19, 1933.

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

A. DELEGATION OF FUNCTIONS AND POWERS.

Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities, and tenure.

2. Under the conditions prescribed in section 203 of said Act, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act; upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

3. In deciding to extend any aid or grant to any State, county, or municipality, to consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof.

4. In his discretion, and under such terms as he may prescribe, to extend any of the benefits of Title II of said Act to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

B. REGULATIONS.

Pursuant to the authority vested in me by section 209 of the National Industrial Recovery Act I hereby prescribe the following rules and regulations as necessary to carry out the purposes of Title II of said Act:

1. No convict labor shall be employed on any project constructed in whole or in part under the provisions of Title II of said Act. No materials manufactured or produced by convict labor shall be used on any such project.

2. No contractor or sub-contractor on any such project who is subject to a code adopted pursuant to Title I of said Act shall permit any employee to work in excess of the hours of labor prescribed in said code. No other contractor or sub-contractor shall permit any employee to work more than 30 hours in any one week, except by authority of the Administrator; *provided* that working time lost in any week because of inclement weather or unavoidable delay may be worked within the succeeding 20 days; *provided further*, that in localities where a sufficient amount of labor is unavailable in the immediate vicinity of the project a maximum of 130 hours of labor in any calendar month may be authorized by the Administrator; *provided further*, that in localities so remote and inaccessible that employees must be housed in camps the Administrator may authorize labor not to exceed 8 hours in any one day and 40 hours in any one week.

3. No employee on any such project shall be paid less than a just and reasonable wage which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. All such wages shall be paid in lawful money of the United States, in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations which obligations shall be subject to collection only by legal process.

4. Each contractor or sub-contractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid.

5. Should it appear that any individual employed on any such project has been or is being paid less than hereinbefore prescribed, the Administrator shall notify the employer of such individual to pay him all wages due accord-

ing to the prescribed rate. Upon 10 days default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations.

6. Any violation of these rules and regulations may be notified by the Administrator to the District Attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for such violation.

FRANKLIN D. ROOSEVELT.

The White House,
August 19, 1933.

IV.

EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

[PUBLIC RESOLUTION—No. 11—74TH CONGRESS]

[H. J. Res. 117]

JOINT RESOLUTION

Making appropriations for relief purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000, together with the separate funds established for particular areas by proclamation of the President pursuant to section 15 (f) of the Agricultural Adjustment Act (but any amounts thereof shall be available for use only for the area for which the fund was established); not exceeding $500,000,000 in the aggregate of any savings or unexpended balances in funds of the Reconstruction Finance Corporation; and not exceeding a total of $380,000,000 of such unexpended balances as the President may determine are not required for the purposes for which authorized, of the following appropriation, namely: The appropriation of $3,300,000,000 for national industrial recovery contained in the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (48 Stat. 274); the appropriation of $950,000,000

for emergency relief and civil works contained in the Act approved February 15, 1934 (48 Stat. 351); the appropriation of $899,675,000 for emergency relief and public works, and the appropriation of $525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, contained in the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (48 Stat. 1055); and any remainder of the unobligated moneys referred to in section 4 of the Act approved March 31, 1933 (48 Stat. 22): *Provided*, That except as to such part of the appropriation made herein as the President may deem necessary for continuing relief as authorized under the Federal Emergency Relief Act of 1933, as amended, or for restoring to the Federal Emergency Administration of Public Works any sums which after December 28, 1934, were, by order of the President impounded or transferred to the Federal Emergency Relief Administration from appropriations heretofore made available to such Federal Emergency Administration of Public Works (which restoration is hereby authorized), this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (a) Highways, roads, streets, and grade-crossing elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation, $500,000,000; (c) rural electrification, $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000: *Provided further*, That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he

finds it necessary to do so in order to effectuate the purpose of this joint resolution: *Provided, further,* That no part of the appropriation made by this joint resolution shall be expended for munitions, warships, or military or naval material; but this proviso shall not be construed to prevent the use of such appropriation for new buildings, reconstruction of buildings and other improvements in military or naval reservations, posts, forts, camps, cemeteries, or fortified areas, or for projects for nonmilitary or nonnaval purposes in such places.

Except as hereinafter provided, all sums allocated from the appropriation made herein for the construction of public highways and other related projects (except within or adjacent to national forests, national parks, national parkways, or other Federal reservations) shall be apportioned by the Secretary of Agriculture in the manner provided by section 204 (b) of the National Industrial Recovery Act for expenditure by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of the Act of June 18, 1934 (48 Stat. 993): *Provided,* That any amounts allocated from the appropriation made herein for the elimination of existing hazards to life at railroad grade crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, shall be apportioned by the Secretary of Agriculture to the several States (including the Territory of Hawaii and the District of Columbia), one-half on population as shown by the latest decennial census, one-fourth on the mileage of the Federal-aid highway system as determined by the Secretary of Agriculture, and one-fourth on the railroad mileage as determined by the Interstate Commerce Commission, to be expended by the State highway department under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of such Act of June 18, 1934 (48 Stat. 993); but no part of the funds apportioned to any State or Territory under this joint resolution for public highways and grade crossings need be matched by the State or Territory: *And provided further,* That the President may also allot funds made available by

this joint resolution for the construction, repair, and improvement of public highways in Alaska, Puerto Rico, and the Virgin Islands, and money allocated under this joint resolution to relief agencies may be expended by such agencies for the construction and improvement of roads and streets: *Provided, however,* That the expenditure of funds from the appropriation made herein for the construction of public highways and other related projects shall be subject to such rules and regulations as the President may prescribe for carrying out this paragraph and preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief, where they are qualified, and the President is hereby authorized to predetermine for each State the hours of work and the rates of wages to be paid to skilled, intermediate, and unskilled labor engaged in such construction therein: *Provided further,* That rivers and harbors projects, reclamation projects (except the drilling of wells, development of springs and subsurface waters), and public buildings projects undertaken pursuant to the provisions of this joint resolution shall be carried out under the direction of the respective permanent Government departments or agencies now having jurisdiction of similar projects.

Funds made available by this joint resolution may be used, in the discretion of the President, for the purpose of making loans to finance, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers. Such loans shall be made on such terms as the President shall prescribe and shall be repaid in equal annual installments, or in such other manner as the President may determine.

Funds made available by this joint resolution may be used, in the discretion of the President for the administration of the Agricultural Adjustment Act, as amended, during the period of twelve months after the effective date of this joint resolution.

SEC. 2. The appropriation made herein shall be available for use only in the United States and its Territories and possessions. The provisions of the Act of February 15, 1934 (48 Stat. 351), relating to disability or death compensation and benefits shall apply to those persons receiving from the appropriation made herein, for services rendered

as employees of the United States, security payments in accordance with schedules established by the President: *Provided,* That so much of the sum herein appropriated as the United States Employees' Compensation Commission, with the approval of the President, estimates and certifies to the Secretary of the Treasury will be necessary for the payment of such compensation and administrative expenses shall be set aside in a special fund to be administered by the Commission for such purposes; and after June 30, 1936, such special fund shall be available for these purposes annually in such amounts as may be specified therefor in the annual appropriation Acts. The provisions of section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5) shall not apply to any purchase made or service procured in carrying out the provisions of this joint resolution when the aggregate amount involved is less than $300.

SEC. 3. In carrying out the provisions of this joint resolution the President may (a) authorize expenditures for contract stenographic reporting services; supplies and equipment; purchase and exchange of law books, books of reference, directories, periodicals, newspapers and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized; rental at the seat of government and elsewhere; purchase, operation, and maintenance of motor-propelled passenger-carrying vehicles; printing and binding; and such other expenses as he may determine necessary to the accomplishment of the objectives of this joint resolution; and (b) accept and utilize such voluntary and uncompensated services, appoint, without regard to the provisions of the civil-service laws, such officers and employees, and utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as may be necessary, prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, fix the compensation of any officers and employees so appointed.

Any administrator or other officer, or the members of any central board, or other agency, named to have general supervision at the seat of Government over the program and work contemplated under the appropriation made in section 1 of this joint resolution and receiving a salary of $5,000 or more per annum from such appropriation, and any State or regional administrator receiving a salary of

$5,000 or more per annum from such appropriations (except persons now serving as such under other law), shall be appointed by the President, by and with the advice and consent of the Senate: *Provided,* That the provisions of section 1761 of the Revised Statutes shall not apply to any such appointee and the salary of any person so appointed shall not be increased for a period of six months after confirmation.

SEC. 4. In carrying out the provisions of this joint resolution the President is authorized to establish and prescribe the duties and functions of necessary agencies within the Government.

SEC. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

SEC. 6. The President is authorized to prescribe such rules and regulations as may be necessary to carry out this joint resolution, and any willful violation of any such rule or regulation shall be punishable by fine of not to exceed $1,000.

SEC. 7. The President shall require to be paid such rates of pay for all persons engaged upon any project financed in whole or in part, through loans or otherwise, by funds appropriated by this joint resolution, as will in the discretion of the President accomplish the purposes of this joint resolution, and not affect adversely or otherwise tend to decrease the going rates of wages paid for work of a similar nature.

The President may fix different rates of wages for various types of work on any project, which rates need not be uniform throughout the United States: *Provided, however,* That whenever permanent buildings for the use of any department of the Government of the United States, or the District of Columbia, are to be constructed by funds appropriated by this joint resolution the provisions of the Act of March 3, 1931 (U. S. C., Supp. VII, title 40, sec. 276a), shall apply but the rates of wages shall be determined in advance of any bidding thereon.

SEC. 8. Wherever practicable in the carrying out of the provisions of this joint resolution, full advantage shall be taken of the facilities of private enterprise.

SEC. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

SEC. 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

SEC. 11. No part of the funds herein appropriated shall be expended for the administrative expenses of any department, bureau, board, commission, or independent agency of the Government if such administrative expenses are ordinarily financed from annual appropriations, unless additional work is imposed thereupon by reason of this joint resolution.

SEC. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution, for the making of further loans under said Act or under this joint resolution.

SEC. 13. (a) The acquisition of articles, materials, and supplies for the public use, with funds appropriated by this joint resolution, shall be subject to the provisions of section 2 of title III of the Treasury and Post Office Appropriation Act, fiscal year 1934; and all contracts let pursuant to the provisions of this joint resolution shall be subject to the provisions of section 3 of title III of such Act.

(b) Any allocation, grant, or other distribution of funds for any project, Federal or non-Federal, from the appropriation made by this joint resolution, shall contain stipulations which will provide for the application of title III of such Act to the acquisition of articles, materials and supplies for use in carrying out such project.

SEC. 14. The authority of the President under the provisions of the Act entitled "An Act for the relief of unemployment through the performance of useful public work, and for other purposes", approved March 31, 1933, as amended, is hereby continued to and including March 31, 1937.

SEC. 15. A report of the operations under this joint resolution shall be submitted to Congress before the 10th day of January in each of the next three regular sessions of Congress, which report shall include a statement of the expenditures made and obligations incurred, by classes and amounts.

SEC. 16. This joint resolution may be cited as the "Emergency Relief Appropriation Act of 1935."

Approved, April 8, 1935, 4 p. m.

V.

EXECUTIVE ORDER OF THE PRESIDENT, JUNE 7, 1935.

AUTHORIZING THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO CONTINUE TO PERFORM FUNCTIONS UNDER TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND TO PERFORM FUNCTIONS UNDER THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935.

Pursuant to the authority vested in me by the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby authorize the Federal Emergency Administration of Public Works, under the Federal Emergency Administrator of Public Works;

(a) to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200);

(b) subject to the rules and regulations heretofore and hereafter prescribed by the President to carry out the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, to perform the following functions under said Act:

(1) make loans or grants, or both, for projects of states, territories, possessions, including subdivisions and agencies thereof, municipalities and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project;

(2) carry out projects for slum-clearance or low-cost housing, or both;

(c) to sell any securities acquired under Title II of the National Industrial Recovery Act, approved June 16, 1933, or under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all moneys realized from such sales shall be available for the making of further loans under the said Title II of the National Industrial Recovery Act or the said Emergency Relief Appropriation Act of 1935, in the performance of the functions herein authorized.

To the extent necessary to carry out the provisions of this Executive Order, the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

* * * *

The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Industrial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies, respectively, after June 30, 1935, for the purposes for

which originally allocated thereto: Provided That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made.

FRANKLIN D. ROOSEVELT.

The White House
June 7, 1935

VI.

EMERGENCY RELIEF APPROPRIATION ACT OF 1936.

[PUBLIC RESOLUTION—No. 739—74TH CONGRESS]

[HR 12624]

TITLE II—RELIEF AND WORK RELIEF

This title may be cited as the Emergency Relief Appropriation Act of 1936.

* * * * * * * * *

In order to increase employment by providing for useful public works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects: *Provided,* That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works: *Provided further,* That this limitation upon time shall not apply to any project enjoined in any Federal or State court: *Provided further,* That in no case shall the amount of the grant exceed forty-five per centum of the cost of the project. Nothing herein

shall be construed to increase the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered under existing law to issue and to have outstanding at any one time, and nothing herein shall be construed to limit or curtail in any way any powers which the Federal Emergency Administration of Public Works or the Administrator is now authorized to exercise.

VII.

SECTIONS 10, 11 AND 12 OF THE TENNESSEE VALLEY AUTHORITY ACT OF 1933 48 STAT. 64, AS AMENDED BY SECTION 6 OF THE ACT OF AUGUST 31, 1935, c. 836, 49 STAT. 1076.

The Board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,* That the Board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of

electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region. *Provided further,* That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: *Provided further,* That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further*: That the terms "States", "counties", and "municipalities" as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction.

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this chapter.

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided*, That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with an local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further*, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further*, That as to any surplus

power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief.